85-355

NO. _____

Supreme Court, U.S.
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CLERK

# In the Supreme Court of the United States

October Term, 1985

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United States of America.....*Respondent*

V.

Paul G. Brown and
Stone's Pharmacy, Inc.....*Petitioners*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

Whether consent to administrative audits required by state and federal authorities to be executed before doing business with the government constitutes consent to warrantless searches for evidence in criminal proceedings?

Whether statements by the government in its closing argument distorting the government's burden of proof denies a defendant a fair and impartial trial?

Whether statements by the government in its closing argument constituted an impermissible appeal to the pecuniary interest of the jurors as taxpayers?

Whether failure of the trial court to make a preliminary determination as to the probative value and truthfulness of prejudicial matters intended by the government to be used for impeachment of defendants' character witnesses denied defendants the right to a fair and impartial trial?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Paul G. Brown and Stone's Pharmacy, Inc. petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed June 5, 1985, is attached hereto as Appendix A Infra, (p. A-1). The denial of Petitioner's Motion for Rehearing and Rehearing En Banc is attached as Appendix B, Infra (p. B-1).

## JURISDICTION

The judgment of the Court of Appeals was entered June 5, 1985. A timely Petition for Rehearing and Request

for Rehearing En Banc was denied on July 5, 1985 (Appendix B). This Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## FEDERAL STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1396h (a)(1)(i) provides, in pertinent part:

Whoever—

> (1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter,

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000,00 or imprisoned for not more than five years or both * * *.

## UNITED STATES CONSTITUTION

*Amendment IV*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Amendment VI*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

Stone's Pharmacy, Inc., a closely held corporation owned solely by the defendant Paul Brown and his wife, (hereinafter referred to as Stone's Pharmacy) operated a retail pharmacy in Jonesboro, Arkansas. Stone's Pharmacy was registered as a "provider" with Arkansas Medicaid officials and dispensed medication to Medicaid recipients for which reimbursement was made on a stated formulary. Stone's Pharmacy dispensed generic medication (identical chemical compounds marketed by differing manufacturers) to all of its customers, including medicaid recipients.

In October, 1981, State medicaid agents concluded that Stone's Pharmacy had potentially committed criminal violations of Medicaid laws. Because of the large quantity of generic medication dispensed, it was thought that Stone's Pharmacy may have filed Medicaid claim forms for brand name drugs when generics were actually dispensed. In the fall of 1982, Medicaid examiners conducted a routine audit of Stone's Pharmacy and thereafter recommended that the Medicaid Fraud division of the Arkansas Attorney General's Office (hereinafter MFD) investigate Stone's Pharmacy for potential criminal violations of the Medicaid laws.

From December 2, 1982 through March 11, 1983, MFD agents used fictitious medicaid cards to purchase medication from Stone's Pharmacy in an attempt to gather evidence for use in anticipated criminal proceedings. During that time the MFD agents were conducting a criminal investigation of Stone's Pharmacy under the guidance of the Office of United States Attorney for the Eastern District of Arkansas (USA).

In April, 1983, the USA requested the assistance of the Federal Bureau of Investigation (FBI) due to the anticipated use of search warrants to be executed at Stone's Pharmacy. From at least April, 1983, forward, the FBI, the USA and the MFD conducted a joint investigation of Stone's Pharmacy for the purpose of gathering evidence for use in an-

ticipated criminal proceedings in federal district court. Employees of those agencies had discussed the various alternatives to securing evidence from Stone's Pharmacy including the execution of a search warrant. Prior to June 7, 1983, no final decision to secure a warrant for Stone's Pharmacy had been made. Employees of the FBI, USA and MFD arranged to travel to Jonesboro, Arkansas, for the specific purpose of gathering evidence for use in criminal proceedings.

By pre-arrangement between the FBI, USA and MFD, employees of the MFD entered Stone's Pharmacy on June 7, 1983, to review the books and records of Stone's Pharmacy. The authority later alleged by the government for the search of the records of Stone's Pharmacy by the MFD agents was asserted as Ark. Stat. Ann. §41-4410 (Appendix C). Additionally, since Stone's Pharmacy had, years earlier, been required to sign a consent to administrative inspections in order to receive reimbursement under the Medicaid program, (Appendix D) the government, in opposition to the motion to suppress, contended that the June 7, 1983, search was consensual. In fact, the MFD official had merely shown his credentials and demanded to see the records.

While the MFD employees searched through records inside Stone's Pharmacy, the FBI agent waited in the area. After reviewing the records all morning, the MFD employees met with the FBI agent during lunch and explained that additional information needed to be obtained. Thereafter, the MFD agent returned to Stone's Pharmacy while the FBI agent waited in the parking lot. In spite of a request of Paul Brown for information regarding the purpose of the review, no explanation was provided. Upon completion of the search, the MFD agent so advised the FBI agent who entered Stone's Pharmacy, and after first reading a Miranda type warning to Paul Brown, advised him of the criminal investigation they were conducting. No further information was requested.

The information obtained from the June 7th search was incorporated in an affidavit for a search warrant as information gained after "voluntarily" being allowed access to Stone's Pharmacy records. Based upon that affidavit, a search warrant was issued and the premises of Stone's Pharmacy were, pursuant to that warrant, searched on June 17, 1983. Various prescriptions were seized from Stone's Pharmacy using that warrant and thereafter introduced at a trial of this matter to support all counts of the indictment.

Prior to the trial, the Defendants filed with the court a motion in limine requesting, inter alia, that the prosecutors not be permitted to appeal to the jurors' pecuniary interest as taxpayers. This motion was denied and the prosecutors made repeated references during closing arguments to the pecuniary interest of the jurors as taxpayers, and the Defendants' requests for mistrial were denied. (Appendix E).

The jurors returned a verdict of guilty for both Defendants regarding all forty-seven counts alleging false medicaid claims and not guilty regarding all six of the mail fraud allegations. Paul Brown was sentenced to thirty-six months probation, six months of community service and a ten thousand dollar fine; Stone's Pharmacy, Inc. was ordered to pay a five thousand dollar fine.

The Eighth Circuit Court of Appeals vacated twenty-eight of the alleged false medicaid claim counts for each of the Defendants for insufficiency of the evidence; nineteen of the alleged false medicaid claim counts for each Defendant were affirmed.

## REASONS FOR GRANTING THE WRIT

### WHETHER CONSENT TO ADMINISTRATIVE AUDITS REQUIRED BY STATE AND FEDERAL AUTHORITIES TO BE EXECUTED BEFORE DOING BUSINESS WITH THE GOVERNMENT CONSTITUTES CONSENT TO WARRANTLESS SEARCHES FOR EVIDENCE IN CRIMINAL PROCEEDINGS?

This case presents an important question which should be resolved by this Court, particularly in light of recent decisions re-defining the exclusionary rule. [1] In the instant case, evidence used in at the trial was gathered pursuant to a warrant that was supported by an affidavit which incorporated the results of an earlier warrantless and unconstitutional search. The earlier search was conducted at the request of the FBI by state officials acting under state administrative inspection authority for the sole purpose of gathering evidence for use in a federal criminal proceeding.

Exceptions to warrant requirements have previously been recognized by this Court for "pervasively regulated businesses", *United States v. Biswell*, 406 U.S. 311 (1972) and for "closely regulated" industries, *Colonnade Catering v. United States*, 397 U.S. 72 (1970). However, the purpose of permitting warrantless inspections of such businesses necessarily implies a limitation of such inspections to prohibit their use for the specific purpose of gathering evidence for use in criminal proceedings.

See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed. 2d 305 (1978). Where an administrative inspection is used by law enforcement personnel as a subterfuge, the ra-

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1. *United States v. Leon*, _____ U.S. _____, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984)

*Massachusetts v. Sheppard*, _____ U.S. _____, 104 S.Ct. 3424, 82 L.Ed. 2d 737 (1984)

tionale for permitting warrantless inspections of regulated businessess no longer applies. Moreover, the abuse of such authority by law enforcement personnel would undermine cooperation with any administrative inspection.

The specific holding by the Eighth Circuit Court of Appeals was that the defendant had "expressly consented" to a search of its records "... even if undertaken in the course of a criminal investigation..." because of a consent form which had been filed on behalf of Stone's Pharmacy years earlier as a prerequisite to doing business under the medicaid program. There is no question from the record below that the "inspection" was conducted at the request of federal law enforcement officials for the sole purpose of gathering evidence for use in criminal proceedings.

~~If~~, as the Eighth Circuit Court of Appeals held, the defendants had consented to a search for evidence by criminal investigators, then it has dispensed with any requirement that such consent be given voluntarily. If a knowing or voluntary consent to any search is no longer to be required, the law of search and seizure should be so clarified by this Court.

WHETHER STATEMENTS BY THE GOVERNMENT IN ITS CLOSING ARGUMENT CONSTITUTED AN IMPERMISSIBLE APPEAL TO THE PENCUNIARY INTEREST OF THE JURORS AS TAXPAYERS.

Petitioners assert that the position taken by the United States Court of Appeals for the Eighth Circuit has resulted in a holding on an important question of federal law which is contrary to previous decisions of other Circuit Courts of Appeal.

The obvious thrust of the prosecutor's closing argument was clearly a request to the jury to find Petitioners guilty because they had received public money which had

obviously been provided by taxpayers — presumably the jurors themselves. In addition, the appeal by the prosecutor for the jury to return a guilty verdict amounted to a statement deploring the use of medicaid funds for benefit of the Petitioners and constituted a request by the prosecutor for the jury to make their own statement that they, as taxpayers, disapproved the use of their medicaid funds. The prosecutor's statements were clearly not supported by the evidence. The Fourth Circuit Court of Appeals in *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981), cert. denied, 102 S.Ct. 1016 (1981); the Fifth Circuit in *United States v. Smyth*, 556 F.2d 1179, 1185 (5th Cir. 1977) and the Seventh Circuit in *United States v. Trutenko*, 490 F.2d 678, 679 (7th Cir. 1973) have all condemned statements by the prosecuting attorney in closing argument which appealed to the pecuniary interest of the jurors. Such a practice also is contrary to the ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function §5.8(c) (1972). Since pecuniary interest would disqualify a prospective juror from service, it is improper to make such an appeal in closing argument.

The importance of an unbiased fair minded jury is essential to the proper administration of justice. To permit the government to appeal to the pecuniary interest of the jurors, as the Court of Appeals has been in this case, creates a double standard among the circuits that should be resolved.

## WHETHER STATEMENTS BY THE GOVERNMENT IN ITS CLOSING ARGUMENT DISTORTING THE GOVERNMENT'S BURDEN OF PROOF DENIES A DEFENDANT A FAIR AND IMPARTIAL TRIAL.

This issue presents a critical question involving a fundamental principle of criminal law, i.e., the government's burden of proof and the distortion of that burden during trial.

On appeal, Petitioners raised, inter alia, the question of whether the district court erred in permitting the prosecutor, in his rebuttal argument, to distort the government's burden of proof. The Eighth Circuit Court of Appeals held that this issue lacked merit, again without discussion. (Appendix A, infra., (p. A-20).

During rebuttal argument, the prosecutor urged the jury to find Paul Brown guilty of the offenses charged in the Indictment because Brown (1) signed the provider agreement as president of Stone's Pharmacy; (2) was the authorized signatory for the pharmacy; (3) had a signature stamp that was used on all of the claim forms; and (4) was the president of Stone's Pharmacy, Inc. (Appendix E, infra., p. E-17).

Prior to the jury retiring for deliberations, counsel for the Petitioners requested that an instruction be given to the jury as follows:

> The fact that Paul G. Brown is President of Stone's Pharmacy, Inc. and executed the provider agreement introduced into evidence does not, in and of itself, provide the necessary specific criminal intent required to find him guilty of the offenses charged in the Indictment.
>
> Unless you find that Paul G. Brown committed the acts alleged in the Indictment knowingly and willfully you should find him not guilty.

The requested charge was made because the prosecutor's rebuttal argument suggested to the jury that Brown was president of the corporation and should therefore be held criminally responsible for the submission of incorrect claim forms without proof of criminal intent. The prosecutor was also attempting to convince the jury that if any employee knowingly and willfully submitted false claim forms, that act should be imputed to Paul Brown

since he, as President, signed the provider agreement. (Appendix E, infra., p. E-17).

After counsel for Petitioners made the request for a charge to the jury clarifying the government's burden of proof, the district court stated:

> I think Mr. Proctor's argument was he's a major stockholder, he set up the corporation, he hired all these people to work, so he's responsible for their conduct.

After making that statement, the court refused to give the requested instruction.

The weakness in the government's case concerning criminal intent is clearly evident from the opinion of the Circuit Court of Appeals. The prosecutor's rebuttal argument had the real effect of distorting the government's burden of proof. Moreover, the conclusiveness of the foregoing statement is reflected by the fact that the trial court was also convinced as to the government's burden of proof.

The Eighth Circuit Court of Appeals has recognized the harm which results from an improper argument distorting the government's burden of proof. *United States v. Reed*, 724 F.2d 677 (8th Cir. 1984).

The trial court was obviously persuaded by the erroneous standard of proof advanced by the prosecutor. Since this was a close case on the issue of criminal intent, the prosecutor's argument carried with it a real and substantial threat of a finding of guilt based upon an erroneous standard.

To permit the Eighth Circuit Court of Appeals to condone such a practice is to violate a defendant's right to due process of law as provided by the Fifth Amendment to the United States Constitution.

WHETHER FAILURE OF THE TRIAL COURT TO MAKE A PRELIMINARY DETERMINATION AS TO THE PROBATIVE VALUE AND TRUTHFULNESS OF PREJUDICIAL MATTERS INTENDED BY THE GOVERNMENT TO BE USED FOR IMPEACHMENT OF DEFENDANTS' CHARACTER WITNESSES DENIED DEFENDANTS THE RIGHT TO A FAIR AND IMPARTIAL TRIAL.

During the trial, defense counsel learned that the government had issued a subpoena to a local physician, Dr. Wayne Taylor, who, it appeared, would be called to testify about allegations that the defendants had improperly dispensed medication to a *non-medicaid* patient. As it turned out, the government intended to ask defense character witnesses about this incident as well as a letter written on behalf of a government witness six days prior to trial referencing allegations of improperly labelling of medication dispensed to nursing home patients by Stone's Pharmacy. The nursing home letter did not identify the pharmacist who prepared the labels. Attached hereto as Appendix F are portions of the transcript reflecting the discussion of these matters.

Defense counsel advised the Court that, based upon the Court's ruling, they would not call seven character witnesses or the defendant (Appendix F, infra, p. F-15). The identity of the character witnesses and the substance of their testimony was later proffered for the record.

Rule 405(a) of the F.R. of Evid. was an attempt to codify the rules announced by the Supreme Court in *Michelson v. United States*, 335 U.S. 469 (1948) relating to the cross-examination of character witnesses through specific instances of the defendant's conduct. The rule permits inquiry only into relevant specific instances of conduct. However,

examination of a defendant's character witnesses is subject to the general limitations of Rule 403 of the F.R. of Evid.; Weinstein's Evidence §405 [02].

Justice Blackmun, writing for the majority in *Gross v. United States*, 394 F.2d 216, 222 (8th Cir. 1968), cert. denied, 397 U.S. 1013 (1970), recognized the potential unfair prejudice that can flow from questions propounded to character witnesses where the "real target" is the defendant himself.

The Eighth Circuit requires that the district court take precautions to ascertain, out of the presence of the jury, (1) that the target of the question was an actual event which would probably result in some comment among acquaintances, i.e., relevant probative value; (2) the truth of the basis for such inquiry; and (3) the unfair prejudice that might flow from the inquiry by conveying to the jury through innuendo the character of the defendant. *Gross v. United States*, supra; See also, *United States v. Tempesta*, 587 F.2d 931 (8th Cir. 1978).

While considerations of the prosecutor's good faith basis for making the inquiry and remoteness of time are factors to be weighed by the district court, such findings are not sufficient for an ultimate determination of admissibility. In this case, the alleged Taylor inquiry and the Department of Health letter were not examined for truthfulness and were not considered for relevance or probative value. A reading of the Taylor memorandum clearly establishes that the real target of any inquiry were the defendants and not the impeachment of a character witness. This strategy was indeed confirmed by the government. The sole result of the questioning would have been to prejudice the defendant by permitting the inquiry to waft an unwarranted innuendo into the jury box.

The inquiry regarding the Health Department letter posed an even greater threat of prejudice. The alleged event was vague and the alleged perpetrator unidentifiable. The subject matter, like the Taylor incident, in all probability would not have resulted in some comment among acquaintances and therefore would have served no purpose

but to cast a shadow over the reputations of Stone's Pharmacy and Paul Brown.

Counsel for the defendants recognized the potential prejudice and were left with no viable alternative but to decline to call seven character witnesses and the defendant due to the district court's ruling. Therefore, the ruling denied the defendants an opportunity to present highly relevant testimony to the jury and violated defendants' rights under the Sixth Amendment to the United States Constitution.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully Submitted

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# APPENDIX A

No. 84-1600

United States of America, *
*
Appellees, *
*
v. *
*
Paul G. Brown, *
*
Appellant. *

No. 84-1601

United State of America, *
*
Appellee, *
*
v. *
*
Stone's Pharmacy, Inc., *
*
Appellant. *

Appeals from the United States District Court for the Eastern District of Arkansas.

Submitted: November 14, 1984

Filed: June 5, 1985

Before BRIGHT, McMILLIAN, and BOWMAN, Circuit Judges.

BRIGHT, Circuit Judge.

Appellants Paul Brown and Stone's Pharmacy, Inc. (the "Corporation") appeal from convictions in a jury trial on forty-seven counts of filing false claims for payment under the Medicaid Program in violation of 42 U.S.C. §1396h(a)(1)(i) (1982). On appeal, appellants contend, *inter alia:* (1) that the district court erred in admitting evidence obtained from a search of the Corporation's records pursuant to a warrant because that warrant was obtained on the basis of information uncovered by a prior warrantless search of the Corporation's records, (2) that the Government's evidence failed to prove that the appellants knowingly and willfully caused false statements to be submitted, and (3) that the false statement counts alleged in the indictment were immaterial as a matter of law because they did not contain a misrepresentation of a material fact. We vacate the convictions on counts 24-47 and 50-53, and affirm the convictions on counts 1-16, 23, and 48-49.

## I. BACKGROUND.

Paul Brown is the president and majority stockholder of the Corporation, an authorized provider of pharmacy services under the Arkansas Medicaid Program. The Corporation became a provider by entering into a contract with Arkansas Social Services ("ASS") to furnish prescription drugs to Medicaid recipients. The terms of the contract required the Corporation to maintain for three years permanent business records of all prescriptions dispensed to Medicaid recipients, purchase invoices for drugs covered under Medicaid, and documentation verifying prescription charges to the general public. The contract also required the Corporation to make those records available to ASS officials or their designated agents for periodic audits.

Upon dispensing medication to a Medicaid recipient, the Corporation would submit a claim for reimbursement to Blue Cross and Blue Shield ("BCBS"), which processes

Medicaid claims in Arkansas. Arkansas operates its Medicaid Program on an "open formulary" basis, which means that all drugs not explicitly excluded are reimbursable. Substitution of generic drugs is permissible under Arkansas law unless explicitly prohibited by the prescribing physician, *see* Ark. Stat. Ann. §§72-1047, 72-1048 (1979); 1979 Ark. Acts 675. In fact, ASS encourages providers to dispense generic drugs whenever possible. *See* Division of Social Services, Arkansas Department of Human Services, Arkansas Medicaid Provider Manual §S-1.10 (1980).

The indictment brought by the Government alleged that Brown and the Corporation knowingly and willfully caused false claim forms to be submitted to BCBS on forty-seven separate occasions. Counts 1-12 involved false claim forms resulting from undercover activities during an investigation of the Corporation. Counts 13-16 involved false claim forms uncovered in a "clinic" conducted by ASS. Counts 23-49 involved false claim forms submitted in connection with the filling and twenty-six subsequent refillings of a prescription for one Medicaid recipient, Norma Morgan. Counts 50-53 involved false claim forms submitted in connection with the filling and three subsequent refillings of a prescription for another Medicaid recipient, Roosevelt Coombs. After a four-day trial, the jury found the appellants guilty on all forty-seven false statement counts. [1]

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The Government also alleged, in counts 17-22 of the indictment, that Brown and the Corporation had devised a scheme to defraud the United States involving the submission of false Medicaid claim forms through the mail in violation of 18 U.S.C. §1341 (1982). The jury acquitted both defendants on all six counts of mail fraud. Those counts are not at issue on this appeal.

## II. DISCUSSION.

### A. Search and Seizure.

On June 7, 1983, Howard Cecil, director of the Medicaid Fraud Division of the Arkansas Attorney General's Office ("MFD"), accompanied by an ASS pharmacist, entered Stone's Pharmacy and advised Brown that he wanted to review certain books and prescription records. This "audit" was part of an ongoing criminal investigation overseen by the United States Attorney's office,[2] not a routine administrative audit. FBI Special Agent Robert Brazile planned the audit with Cecil, but did not accompany Cecil during the actual audit because the statutory authority to conduct such audits extends only to personnel from the Attorney General's office and prosecuting attorneys. Ark. Stat. Ann. §41-4410 (3) (Cum. Supp. 1983). Cecil completed the audit and reported what he had learned to Brazile. Brazile then entered the pharmacy, identified himself to Brown, advised Brown of the joint investigation, and summarized the information the investigation had uncovered to date.

On June 17, 1983, agents of the MFD and FBI conducted a search of the Corporation pursuant to a warrant issued on June 15. During this search, the agents seized copies of certain perscriptions. Before trial, the appellants moved to suppress all the documentary evidence seized by the Government during the June 17 search on the ground that the search warrant was trainted by the allegedly illegal warrantless search of June 7. After an evidentiary hearing, the district court denied the motion, finding that the appellants had consented to the June 7 search or, alternative-

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MFD officials contacted the United States Attorney's office for the Eastern District of Arkansas after they commenced their investigation into the Corporation. In April 1983, the United States Attorney, anticipating that search warrants would be issued, requested the assistance of the FBI. From that date on, all three units participated jointly in the investigation.

ly, that a warrant was not required for what was essentially an administrative inspection.

Appellants contend that the district court erred in admitting the documentary evidence seized from the Corporation during the June 17 search. Although that evidence was seized pursuant to a search warrant, appellants maintain that it should have been suppressed because the search warrant was obtained on the basis of information uncovered during the allegedly improper warrantless inspection of the Corporation's records on June 7. We disagree.

A warrantless search is valid if conducted pursuant to the knowing and voluntary consent of the person subject to a search. [3] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (recharacterizing the "voluntary waiver" exception originally enunciated in *Zap v. United States*, 328 U.S. 624, 628 (1946), [4] in terms of "voluntary consent"). Appellants do not contend that the Corporation [5] did not knowingly and voluntarily enter into a contract with ASS. Rather, they challenge, on two levels, the district court's finding, based on the contractual language, that the Corporation explicitly consented to warrantless searches of pharmacy records. First, they broadly assert that the Corporation did not con-

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The Government also urges that the June 7 search fell within the parameters of the "regulated business" exception to the warrant requirement applicable to administrative searches and seizures. *See United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). In light of our holding that appellants consented to the June 7 inspection, we need not consider the applicability of the regulated business exception.

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On a second petition for rehearing, the Supreme Court vacated the judgment and remanded to the district court for a dismissal of the indictment. 330 U.S. 800 (1947).

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The parties to the contract are ASS and the Corporation. Brown, the principal shareholder of the Corporation, signed the agreement as the authorized agent of the Corporation.

sent, by entering into the contract with ASS, to waive its fourth amendment right to be free from warrantless searches. The thrust of this argument apparently is that the commands of the fourth amendment are inviolable. We disagree.

In *United States v. Griffin*, 555 F.2d 1323 (5th Cir. 1977), a pharmacist appealed from his conviction on charges of filing fraudulent Medicaid claims, asserting that the trial court had erred in admitting evidence seized during a warrantless inspection of the pharmacy's records. The court cited *Zap* in support of its determination that the pharmacist had consented to a warrentless search of the pharmacy's books and records when he knowingly and voluntarily entered a contract in which he agreed to maintain certain records and make them available for inspection. *Id.* at 1325. *See also United States v. Jennings*, 724 F.2d 436, 447-48 (5th Cir.) (citing *Griffin* in reaching identical holding in context of submission of false claims for meals served to children), *cert. denied*, 104 S.Ct. 2682 (1984); *First Alabama Bank v. Donovan*, 692 F.2d 714, 718-20 (11th Cir. 1982) (finding consent to reviews by Department of Labor of bank's employment records to determine compliance with antidiscrimination regulations).

The situation in *Griffin* is virtually identical to the circumstances presented in this case and we agree with the reasoning of the Fifth Circuit. The government has a substantial interest in establishing methods by which it can effectively monitor compliance with the regulations governing the Medicaid Program and root out opportunities for and instances of fraud. We see no constitutional infirmity in the government requiring a provider to agree to maintain records of Medicaid transactions and to permit periodic audits of those records as a condition for participation in the Medicaid Program. In this case, the appellants were aware of this condition, and voluntarily entered into a contract with ASS in which they authorized such audits in exchange

for obtaining the benefits attendant to participation in the Medicaid Program. Accordingly, we hold that the appellants explicitly consented to reasonable warrantless inspections of the pharmacy records by entering into the contract with ASS. The June 7 inspection occurred during business hours and in the presence of Brown and nothing in the record suggests that the inspection was conducted in an unreasonable manner.

The appellant also raise a more specific challenge to the district court's finding of consent. They contend that even if they did consent to a warrantless search by entering into the contract with ASS, that consent extends only to routine civil audits conducted by ASS personnel, and not to searches conducted to gather evidence in the course of a federal criminal investigation. This argument, too, must fail.

ASS compiled a manual, entitled the "Medicaid Provider Manual," which contained instructions, state and federal regulations, and specific policies relating to the Medicaid Program. ASS supplies a copy of the manual to any pharmacy contemplating whether to become a provider. When a pharmacy agrees to participate in the Medicaid Program, it agrees to be bound by all valid regulations and laws as set forth in the Manual. Sections 2.02 and S-1.11 of the Manual provide that audits of provider pharmacies may be conducted by MFD agents — the criminal fraud division of the Office of the Attorney General. In addition, the Arkansas legislature, in an attempt to eliminate fraud in the Medicaid Program,[6] added section 41-4410 to the Code in 1979. That section provides, in pertinent part:

> (2) No person shall be eligible to receive any payment from the Arkansas Medicaid Program * * * unless such person has, in writing, authorized the Commissioner of Arkansas Social Services to ex-

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*See* Ark. Stat. Ann. §41-4401 preamble (Cum. Supp. 1983); 1979 Ark. Acts No. 823, §13.

> amine all records for the purpose of investigating whether any person may have committed the crime of Medicaid fraud, or for use or for potential use in any legal, administrative or judicial proceedings.
>
> (3) The Attorney General and the Prosecuting Attorneys shall be allowed access to all records of persons and Medicaid recipients under the Arkansas Medicaid Program to which the Commissioner of Arkansas Social Services has access for the purpose of investigating whether any person may have committed the crime of Medicaid fraud, or for use or potential use in any legal, administrative or judicial proceeding.

Ark. Stat. Ann. §41-4410(2)(3)(Cum. Supp. 1983).

The statute and regulations clearly contemplate that audits may be conducted pursuant to a criminal investigation.[7] Appellants had at least constructive, if not actual, knowledge of the statute and ASS policies and yet entered the contract and continued to participate in the Program. Accordingly, we hold that appellants expressly consented to an inspection of the Corporation's records undertaken to determine if the appellants were committing Medicaid fraud.

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Appellants resist this straightforward reading of the statutory language. They point to subsection (4) of section 41-4410 which provides: "(4) Notwithstanding any other law to the contrary, no person shall be subject to any civil or criminal liability for providing access to records to [any of the authorized agents]." They assert that this language reflects the legislature's intent that a provider not be subjected to criminal liability for providing access to records to appropriate state agents. We disagree. Appellants' construction of subsection (4), if accepted, would negate the express language in subsections (1), (2), (3), and (5), and the expressed intent of the Arkansas legislature in enacting the statute. It is also of no little import that section 41-4410 is contained in the criminal offenses title of the Arkansas Code. Although we have been unable to find any cases construing subsection (4), we think that it obviously was intended to shield any employee of a provider from criminal prosecution or civil liability to the provider for providing state officials with access to the provider's records.

We note, in any event, that Cecil did not actually seize any documents or other evidence during the June 7 inspection. The contested evidence was seized during the June 17 search which was conducted pursuant to a warrant. Because we hold that appellants expressly consented to an audit of the Corporation's records, even if undertaken in the course of a criminal investigation, the warrantless inspection of the Corporation's records on June 7 was valid. Consequently, it could not have tainted the June 17 search and seizure. Accordingly, the district court did not err in denying the appellants' motion to suppress the documentary evidence seized in the June 17 search.

B. Sufficiency of the Evidence

The Government charged in each count of the indictment that the appellants dispensed a generic drug but submitted a claim to BCBS for a more expensive brand name drug. Appellants assert that the evidence adduced by the Government was insufficient to establish a violation of 42 U.S.C. §1396h(a)(1)(i)(1982). [8]Specifically, they contend that the Government did not introduce sufficient evidence to establish that Brown knowingly and willfully caused false

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Section 1396h(a)(1)(i) provides, in pertinent part:

Whoever—

> (1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter,

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both * * *.

claim forms to be submitted.[9] They note that even the Government conceded that the remittance advices[10] showed that the appellants had dispensed and billed for generic drugs on thousands of occasions. Consequently, they maintain that the specific instances of dispensing generics and billing for brand name drugs charged in the indictment constituted evidence only of errors in preparing and submitting claims (negligence), rather than of a knowing and willful intent to submit false claims. In addition, Brown contends that the Government failed to introduce any evidence showing who prepared the claim forms, how they were prepared, or what records were used in their preparation, and, consequently, did not prove that *he* caused the false claims to be submitted.

The Government must, of course, introduce evidence to prove each element of a crime, but the evidence is sufficient to support a criminal conviction if, when viewed in the light most favorable to the Government, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see United States v. Yancy*, 688 F.2d 70, 71 (8th Cir. 1982). Appellants cannot succeed on a challenge to the sufficiency of the evidence simply because the Government lacks direct evidence of the intent to defraud. The jury may properly infer that intent from circumstantial evidence; indeed, circumstantial evidence is often the "only available means of proving intent." *United States v. Huckaby*, 698 F.2d 915, 918 (8th Cir. 1982), *cert. denied*, 460

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The Government did not introduce any evidence as to who actually prepared the claim forms involved in this case. Its theory throughout has been that Brown "caused" the false claim forms to be submitted, even if he did not prepare them himself, by dispensing a generic but making out labels (from which the claim form were prepared) or other records indicating that a brand name had been dispensed.

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A remittance advice is a statement issued by BCBS to a provider listing the Medicaid recipients, the drugs provided, the amounts billed by the provider, and the amounts actually reimbursed to the provider.

U.S. 1070 (1983; *see Yancy*, 688 F2d at 71; *United States v. Conzemius*, 586 F.2d 97, 99 (8th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). However, a conviction based on evidence that requires speculation or mere conjecture by the jury is invalid. *United States v. Richmond*, 700 F.2d 1183, 1189 (8th Cir. 1983); *United States v. Knife*, 592 F.2d 472, 475 (8th Cir. 1979).

Upon a review of the record, we think the evidence is sufficient to support the jury's verdict on counts 1-16, 23, and 48-49, but not on counts 24-47 and 50-53. The Government's theory of the case is simple, although the evidence presented was all circumstantial and somewhat confusing. The appellants assert that the Government's case required the jury to infer the requisite fraudulent intent from the mere substitution of generics. We disagree. The theory pressed at trial by the Government was that the repetitious pattern of submitting claims for brand name drugs even though generics had been dispensed demonstrated the requisite knowledge and willfulness, and that Brown's actions in filling the prescriptions and preparing the labels for the vials and the records to be kept on file caused the false claims to be submitted even if Brown himself did not actually prepare and submit the claim form in each instance.

Counts 1-12 rested on false claims arising out of an undercover investigation of the Corporation conducted by the MFD between December 12, 1982, and April 4, 1983. During this period, six investigators from the MFD posed as Medicaid recipients and had prescriptions filled at Stone's Pharmacy. On each count, the Government called the investigator who testified that Brown had filled his or her prescription. In addition, the Government introduced the claim forms submitted in each case, all of which sought reimbursement for a brand name drug, although an ASS pharmacist testified that, in each instance, the drug actually dispensed was a generic substitute or the nonreimbursable, over-the-counter vitamin "Theragran M."

Six of these counts related to claim forms processed after the beginning of February 1983 when the Corporation obtained a computer system which automatically generated claim forms for Medicaid transactions. On these counts, the Government introduced the computer labels, which were prepared based on instructions from the dispensing pharmacist, from which the information required to prepare the claim forms was taken. Three of the labels bore the letters "XXX", which the Government alleged was a code used by the appellants to indicate generic substitutions for brand name drugs. Two other labels contained discrepancies as to the name of the drug which had been dispensed. On those two counts, the Government introduced into evidence the vial given to the Medicaid recipient from which the bottom portion of the label had been cut off, allegedly to prevent the recipient from discovering the discrepancy. All of the computer labels bore the initials "PB" or "RPB."

Counts 13-16 involved false claim forms uncovered during a "clinic" conducted by MFD agents and an ASS pharmacist on June 9, 1983. An ASS pharmacist examined the remittance advice for the Corporation for the months of March, April, and May of 1983 and identified all the drugs which had generic equivalents. MFD officials then contacted the recipients who had received any of these drugs and asked them to bring their medication to the ASS offices for inspection. At trial, the Government presented evidence that ASS pharmacists examined the drugs contained in the bottles and discovered four more instances in which the Corporation had billed for a brand name drug when a generic had actually been dispensed. Two of the labels again contained the letters "XXX", and the bottom portion of another label had again been cut off the vial. Although none of the recipients involved testified as to the identity of the dispensing pharmacist, the labels introduced into evidence bore the initials "PB" or "RPB".

On twenty-seven separate occasions between February 12, 1981, and March 7, 1983, Norma Morgan had her

prescription for an over-the-counter vitamin (Geriplex) filled at Stone's Pharmacy. Counts 23-49 involved false claim forms, in which the Corporation claimed reimbursement for the brand name drug Trinsicon, submitted to BCBS in connection with these transactions. The Government introduced at trial a copy of Morgan's prescription as it had been transcribed by someone at the Corporation. That copy indicated a prescription for Trinsicon and listed the NDC number for Trinsicon. However, the "Rx" was circled, accompanied by the notation "over." On the reverse side was the inscription "(also Rx for Geriplex Caps)". Dr. Joe Verser, the prescribing physician, testified at trial that he had prescribed Geriplex, and would never have prescribed Trinsicon for Morgan. In addition, Morgan's husband testified at trial that in February 1981, when he and his wife first brought her prescription (written for Geriplex) into Stone's Pharmacy to be filled, the dispensing pharmacist, whom Morgan identified as Brown, told him that "he'd have to change the number of it or the name one. [sic] Medicare [sic] might not pay for it." Morgan testified that he told Brown he would pay for the drugs himself if Medicaid did not. When he inquired into the matter on a subsequent visit, Brown replied: "It [Medicaid] took care of it."

The Morgans' testimony only identified Brown as the dispensing pharmacist on their first visit (Count 23); the Government offered no testimony or other evidence to show who refilled the prescription on the twenty-two occasions leading to the false claim forms that form the basis of counts 24-45. The transactions underlying counts 48 and 49 were

processed through the computer system.[11] On these counts, the Government introduced the computer labels which contained the initials "RPB."

In our view, the evidence presented by the Government on courts 1-16, 23, and 48-49, is sufficient to support the jury's verdict that Brown knowingly and willfully caused false claim forms to be submitted. Morgan's testimony concerning Brown's statements that he would have to change the name of the drug so Medicaid would cover it, the evidence that portions of some labels had been cut off and that other labels contained code letters, and the repetitious manner in which these false claims occurred with respect to a few specific drugs provided ample evidence from which the jury could have concluded that the claim forms were submitted with the requisite knowledge and willfulness rather than as a result of simple errors. The Government's theory that Brown caused the claim forms to be submitted by dispensing the medication and preparing the information on the labels from which the claim forms were prepared, even if he did not prepare the forms himself, is legally sufficient to satisfy the causation element of section 1396h(a)(1)(i). Eyewitness testimony established that Brown was the dispensing pharmacist on the occasions underlying counts 1-12 and 23. On counts 13-16 and 48-49, the Government introduced evidence showing the initials of the dispen-

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Counts 23-45 involved claim forms processed manually before February 1983, when the Corporation switched to the computer system. The Government introduced no evidence at trial from which the jury could draw conclusions as to the personnel involved in the manually-processed transactions solely from documentary evidence. The only evidence introduced by the Government indicating which pharmacy personnel were involved in the manually-processed transactions was testimony from the Medicaid recipients identifying Brown as the dispensing pharmacist. It was only with the counts based on claim forms prepared after the Corporation obtained its computer system that the Government was able to do without direct eyewitness identification and rely on initials contained on the computer labels and printouts to establish the identity of the dispensing pharmacist.

sing pharmacist as "PB" or "RPB." Although the Government did not directly establish that these were Brown's initials, the same initials were found on labels in several of the counts in which Brown was identified as the dispensing pharmacist. Moreover, a review of the record and transcript of the trial proceedings discloses only three other pharmacists who worked at the Corporation during this time: Larry Yancy, Sherry Stone, and David Panick. Thus, the jury could reasonably have concluded that Brown also filled the prescriptions in these six counts.

The evidence introduced by the Government is not sufficient, however, to support Brown's conviction on counts 24-47 and 50-53. Counts 24-45 involved manually-prepared claim forms. As noted above, the Morgans' testimony indicated only that Brown had been the dispensing pharmacist on the occasion underlying count 23 and the Government did not introduce any other evidence from which the jury could reasonably have concluded that Brown was the dispensing pharmacist on any of the occasions underlying counts 24-45. [12] Thus, although Brown may very well have been the dispensing pharmacist on some or all of these occasions, the Government adduced no evidence to that effect but merely invited the jury to speculate that because he fill-

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This, of course, was not the only theory upon which the Government could have proceeded against Brown. It might, for example, have pursued a theory alleging that even if Brown did not actually fill a particular prescription and prepare the records, he supervised or oversaw the dispensing of all drugs or exercised total control over the operation of the pharmacy such that he could be held responsible for the acts of other pharmacy personnel. Nonetheless, it did not introduce any evidence detailing the operations or procedures followed at Stone's Pharmacy or demonstrating the degree of control exercised by Brown over the operation of the business. The Government does talk about a code in its brief and the suspicion that the appellants employed some type of code to identify generic substitutions led to the decision to conduct the June 7 inspection. The Government did not, however, develop this theory at trial. Consequently, because the Government chose simply to proceed at trialunder the theory that Brown caused the false claims to be submitted by filling a prescription and preparing the label, the evidence it presented must be assessed in that light.

ed the initial Morgan prescription and some of the others charged in the indictment, he probably filled the prescriptions and prepared the labels on these occasions too. That evidence, in our view, is just too attenuated, conjectural, or speculative to support the jury's verdict on those counts. *See Richmond*, 700 F.2d at 1189; *Knife*, 592 F.2d at 475.

The transactions in counts 46-47, also involving false claim forms submitted in connection with refills of the Morgan prescription, were processed on the computer. Although the Government offered no testimony as to who the dispensing pharmacist was on either occasion, the computer labels introduced into evidence on these two counts bore the initials "LY." Consequently, the Government presented no evidence on these two counts from which the jury could reasonably have concluded that Brown was the dispensing pharmacist or that he otherwise caused the false claim forms to be submitted on these occasions.

Counts 50-53 involved claim forms submitted for medication dispensed to Roosevelt Coombs. On four occasions, Coombs received a nonreimbursable vitamin supplement (Clusivol), but the Corporation billed Medicaid for Trinsicon. Coombs' prescription, as originally written, was for Clusivol. On the Corporation's copy of the prescription, however, "Clusivol" had been scratched out, accompanied by the notation "not covered by Medicaid," and the NDC number for Trinsicon had been written in. As with counts 24-47, however, the Government did not present evidence, either in the form of testimony identifying Brown as the dispensing pharmacist or labels containing Brown's initials, from which the jury could reasonably have found that Brown was involved in filling the prescription, preparing a copy of the prescription for file, or preparing the claim forms on any of these four occasions. Here, too, the evidence required speculation on the part of the jury as to Brown's involvement and, consequently, his conviction on these four counts cannot stand.

This analysis of the evidence applies equally to the Corporation's conviction. [13] There is no question but that the Corporation submitted false claims as alleged in each count of the indictment; the Government's evidence clearly demonstrated that. That showing, however, is not enough. The Government also had to prove that the false claims were knowingly and willfully submitted. Because the corporate entity itself does not possess any volitional capacity, the requisite knowledge and willfulness exists only if it is attributable to the Corporation through the acts of its agents. Because we have held that the evidence presented by the Government was sufficient to support the jury's verdict that Brown, an agent of the Corporation, acted with the requisite knowledge and willfulness on counts 1-16, 23, and 48-49, that knowledge and willfulness may be attributed to the Corporation. Accordingly, the evidence presented by the Government is sufficient to support the conviction of the Corporation on those counts. However, the Government's evidence is insufficient to establish the requisite knowledge and willfulness on the part of the Corporation in the transactions underlying counts 24-47 and 50-53. Indeed, the Government produced no evidence whatsoever as to the identity of the employees who participated in the transactions underlying counts 24-45 and 50-53 or as to the conduct of Paul Brown, president of the Corporation, or any corporate supervisor relating to those counts. Thus, even though the Government introduced sufficient evidence on these counts to establish that the Corporation submitted

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The Corporation does stand in a somewhat different legal position than Brown in view of the statutory language of section 1396h (a)(1)(i). That section applies to "[w]hoever—(1) knowingly and willfully makes or causes to be made any false statement * * *." In this case, the Corporation is the provider, and, consequently, is the entity that actually "made" the false statements. Brown, the president of the Corporation, did not actually make the false statements alleged in the indictment but, according to the Government, he caused them to be made. Nonetheless, the different relative positions of Brown and the Corporation under the statute do not compel a different result in view of the evidence presented by the Government.

false claim forms, no evidence exists upon which the jury could have found the requisite volitional state which could be attributed to the Corporation. Consequently, the conviction of the Corporation on counts 24-47 and 50-53 also cannot stand.

C. Materiality of False Statement Counts.

Section 1396h(a)(1) requires the "false statement or representation of a material fact." Appellants cite *Blake v. United States*, 323 F.2d 245, 246 (8th Cir. 1963), in which this court defined "materiality" in terms of "whether [the statement] 'has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made' " and assert that the false statements in counts 1-12 (claims resulting from the undercover investigation) were not material because BCBS paid these claims with knowledge that the information was incorrect. Consequently, according to the appellants, the false claim forms could not have had the tendency or capability of influencing BCBS's decision to pay.

We disagree. Materiality is a question of law, *see United States v. Holecek*, 739 F.2d 331, 337 (8th Cir. 1984); *United States v. Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980), and we have held that a statement is material if it is necessary "to put the claimant in a position to receive government benefits, whether rightfully or wrongfully." *Adler*, 623 F.2d at 1291. Materiality does not require actual reliance by the government on the statement. *United States v. Richmond*, 700 F.2d 1183, 1188-89 (8th Cir. 1983); *United States v. Cowden*, 677 F.2d 417, 419 (8th Cir. 1982); *see Holecek*, 739 F.2d at 337 (quoting *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984) ).

An ASS pharmacist testified at trial that BCBS paid out claims on the basis of price information coded to the NDC number, unless the amount listed by the provider in

the total amount billed column was less, in which case BCBS paid that amount. [14] In each count of the indictment, the Government established that the claim form listed an NDC number for a brand name drug when a generic or over-the-counter vitamin had been dispensed. Submission of a claim for reimbursement for drugs dispensed which does not accurately reflect the drugs dispensed constitutes a misrepresentation of a material fact because it put the Corporation in the position to receive government benefits it had no rightful claim to receive.

Appellants contend, however, that even if the claim forms did misrepresent the drug actually dispensed, the Government did not prove that that misrepresentation was material because it presented no testimony establishing that the generics dispensed were cheaper than the brands claimed or that the Corporation received reimbursement for an amount in excess of that to which it was entitled. We disagree. It is well-known that generics are cheaper than the equivalent brand name product; indeed, that is the very reason that ASS encouraged providers to substitute generics whenever possible. A BCBS pharmacist testified that, within her experience, every generic drug was significantly less expensive than the brand name drug. She was unable to establish the actual difference in price in each count of the indictment only because she was unable to determine the manufacturer of some of the generics dispensed and each generic had a different price. We hold, as a matter of law, that the false statements in each count contained a misrepresentation of material fact. Thus, appellants are entitled to no relief on this ground.

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The claim forms require the provider to include the prescription number, the name and identification number of the prescribing physician, the date of the prescription and date the prescription was filled, the NDC number and quantity of the drug supplied (the NDC number is an identification number given to a drug when it is released on the market), and the total amount billed.

The appellants raise numerous other points of error. We have carefully examined each of these arguments and conclude that all of them are without merit.

## III. CONCLUSION.

We affirm the convictions of both Brown and Stone's Pharmacy on counts 1-16, 23, and 48-49, but vacate the convictions on counts 24-47 and 50-53. The judgment of the district court is modified accordingly. The vacation of the convictions on these counts does not effect the sentence. [15]

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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15

The court fined Brown $10,000 on count 1, and suspended imposition of sentence on count 2, placing Brown on probation for 36 months with a special condition that he perform specified community service for a period of six months. The court also suspended imposition of sentence on counts 3-16 and 23-53, with the 36-month probationary period on each to run concurrent with that on count 2. The court fined the Corporation $5,000 on each count, but made the fines on counts 2-16 and 23-53 concurrent with the fine on count 1, for a total fine of $5,000.

# APPENDIX B

United States Court of Appeals
For The Eighth Circuit

September Term, 1984

Nos. 84-1600/1601-EA.

| | | |
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| United States of America, | * | |
| | * | |
| Appellee, | * | Appeals from the United |
| | * | States District Court for |
| VS. | * | the Eastern District |
| | * | of Arkansas |
| Paul G. Brown, Et Al., | * | |
| | * | |
| Appellants. | * | |

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 5, 1985

# APPENDIX C

41-4410. Medicaid recipients to authorize examination of records—Commissioner, attorney general and prosecuting attorneys to have access to records—Records confidential—Records to be maintained—Penalties.

(1) No potential Medicaid recipient shall be eligible for such medical assistance unless he has, in writing, authorized the Commissioner of Arkansas Social Services to examine all records of his own, or of those receiving or having received Medicaid benefits through him, whether the receipt of such benefits would be allowed by the Arkansas Medicaid Program or not, for the purpose of investigating whether any person may have committed the crime of Medicaid fraud, or for use or potential use in any legal, administrative or judicial proceeding.

(2) No person shall be eligible to receive any payment from the Arkansas Medicaid Program or its fiscal agents unless such person has, in writing, authorized the Commissioner of Arkansas Social Services to examine all records for the purpose of investigating whether any person may have committed the crime of Medicaid fraud, or for use or for potential use in any legal, administrative or judicial proceeding.

(3) The Attorney General and the Prosecuting Attorneys shall be allowed access to all records of persons and Medicaid recipients under the Arkansas Medicaid Program to which the Commissioner of Arkansas Social Services has access for the purpose of investigating whether any person may have committed the crime of Medicaid fraud, or for use or potential use in any legal, administrative or judicial proceeding.

(4) Notwithstanding any other law to the contrary, no person shall be subject to any civil or criminal liability for

providing access to records to the Commissioner of Arkansas Social Services, the Attorney General or the Prosecuting Attorneys.

(5) Records obtained by the Commissioner of Arkansas Social Services, the Attorney General or the Prosecuting Attorneys pursuant to this Act [§§ 41-4401 — 41-4410] shall be classified as confidential information and shall not be subject to outside review or release by any individual except when such records are used or potentially to be used by any government entity in any legal, administrative or judicial proceeding.

(6) All persons under the Arkansas Medicaid Program are hereby required to maintain at their or its principle [principal] place of Medicaid business all records at least for a period of three (3) years from the date of claimed provision of any goods and/or services to any Medicaid recipient.

(7) Any person found not to have maintained any records shall be guilty of a class D felony if the unavailability of such records impairs or obstructs the prosecution of a felony; otherwise, the unavailability of such records shall be a class A misdemeanor. [Acts 1979, No. 823, § 10, p. 1807.]

Compiler's Notes. The bracketed word "principal" was inserted by the compiler.

# APPENDIX D

## ARKANSAS SOCIAL SERVICES PHARMACY AGREEMENT TO PARTICIPATE IN TITLE XIX (MEDICAID) PRESCRIPTION DRUG PROGRAM

This is to certify that
Stone's Pharmacy Inc.
(print or type name of provider)

agrees to participate in the Arkansas Medicaid Prescription Drug Program as a provider of Pharmacy services, and agrees to comply with all the following items:

1. To supply designated Federal legend drugs, insulin and authorized over-the-counter products as prescribed by a licensed physician, dentist, podiatrist, or osteopath to all certified eligible recipients under the Arkansas Medicaid-Title XIX Program, without regard to race, color, religion or national origin; to refill all prescriptions as authorized by the physician, dentist, podiatrist, or osteopath; to dispense in reasonably prescribed quantities subject to the limitations set forth in the Arkansas Social Services Prescription Drug provider's manual; and to supply the same quality of service customarily provided other persons. The pharmacist reserves the right under this agreement to decline to dispense any prescription which appears to be improperly executed or which in his professional judgment is inappropriate as presented.

2. To price all such prescriptions in a manner consistent with the pharmacy's prevailing charge to the public for comparable products and services. The charge submitted to Medicaid shall be documentable by the provider pharmacy as its prevailing charge and will be available for audit by Program auditors for a period of three

years from the date of service. The auditing of non-Medicaid prescriptions will be limited to the amount charged, date of service and the prescription number.

3. To acccept payment from Medicaid as payment in full except for the collection of any applicable copayment which will be deducted for each prescription dispensed under the Program.

4. To maintain as a permanent record an individual prescription for each drug submitted for reimbursement under this agreement and to file said prescription numerically or in normally occurring order with other prescriptions filled by the provider, or in a separate file, and to record each refill, and to preserve these records for a period of at least three (3) years from the date of the last service.

5. To make available such business records as may be essential to satisfy audit requests under the Program with such audits to be conducted periodically by Arkansas Social Services or their designated agents. Such business records include, but are not limited to, all prescriptions dispensed under the Program, contracts with other third party programs, purchase invoices for drug products covered under Medicaid, and documentation verifying prescription charges to the general public.

6. To clearly record all required information on the claim form.

7. This agreement may be terminated on thirty (30) days written notice by either party.

8. This agreement is subject to all valid State and Federal laws and regulations pertaining to the Title XIX Program and provider agrees to be bound by any changes or amendments thereto upon notification in writing.

Nothing contained in this agreement shall be construed as a waiver of provider's right to challenge the validity of any such State and Federal law and regulation.

PARTICIPATING PHARMACY

By /s/ Paul A. Brown
Authorized Agent

TITLE OF AGENT Pharmacist (Owner)

DATE 1-8-79

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PHARMACY APPLICATION

03-619 (Old Number)
Provider Number
(to be assigned)

Stone's Pharmacy Inc.
Name of Pharmacy

315 E. Matthews — Jonesboro — Ark — Craighead — 72401
P.O. Box No. or St. No. — City — State — County — Zip Code

315 E. Matthews
Pay-to St. Add. & Name

Jonesboro — Ark. — 72401
City — State — Zip Code

AR 71-0404595 — AS 712-143-3
IRS Employer No. — DEA Number

04-03852
Pharmacy Permit No.

# ARKANSAS SOCIAL SERVICES
# PHARMACY AGREEMENT TO PARTICIPATE
# IN TITLE XIX (MEDICAID)
# PRESCRIPTION DRUG PROGRAM

This is to certify that
Stone's Pharmacy Inc.
(print or type name of provider)

agrees to participate in the Arkansas Medicaid Prescription Drug Program as a provider of Pharmacy services, and agrees to comply with all the following items:

1. To supply designated Federal legend drugs, insulin and authorized over-the-counter products as prescribed by a licensed physician, dentist, podiatrist, or osteopath to all certified eligible recipients under the Arkansas Medicaid-Title XIX Program, without regard to race, color, religion or national origin; to refill all prescriptions as authorized by the physician, dentist, podiatrist, or osteopath; to dispense in reasonably prescribed quantities subject to the limitations set forth in the Arkansas Social Services Prescription Drug provider's manual; and to supply the same quality of service customarily provided other persons. The pharmacist reserves the right under this agreement to decline to dispense any prescription which appears to be improperly executed or which in his professional judgment is inappropriate as presented.

2. To price all such prescriptions in a manner consistent with the pharmacy's prevailing charge to the public for comparable products and services. The charge submitted to Medicaid shall be documentable by the provider pharmacy as its prevailing charge and will be available for audit by Program auditors for a period of three years from the date of service. The auditing of non-Medicaid prescriptions will be limited to the amount charged, date of service and the prescription number.

3. To acccept payment from Medicaid as payment in full except for the collection of any applicable copayment which will be deducted for each prescription dispensed under the Program.

4. To maintain as a permanent record an individual prescription for each drug submitted for reimbursement under this agreement and to file said prescription numerically or in normally occurring order with other prescriptions filled by the provider, or in a separate file, and to record each refill, and to preserve these records for a period of at least three (3) years from the date of the last service.

5. To make available such business records as may be essential to satisfy audit requests under the Program with such audits to be conducted periodically by Arkansas Social Services or their designated agents. Such business records include, but are not limited to, all prescriptions dispensed under the Program, contracts with other third party programs, purchase invoices for drug products covered under Medicaid, and documentation verifying prescription charges to the general public.

6. To clearly record all required information on the claim form.

7. This agreement may be terminated on thirty (30) days written notice by either party.

8. This agreement is subject to all valid State and Federal laws and regulations pertaining to the Title XIX Program and provider agrees to be bound by any changes or amendments thereto upon notification in writing. Nothing contained in this agreement shall be construed

as a waiver of provider's right to challenge the validity of any such State and Federal law and regulation.

PARTICIPATING PHARMACY

By /s/ Sherry Stone,R.Ph.
Authorized Agent

TITLE OF AGT. Reg.Phar. in Chg.

DATE June 24, 1977

---

PHARMACY APPLICATION

03-619
Provider Number
(to be assigned)

Stone's Pharmacy
Name of Pharmacy

315 E. Matthews | Jonesboro | Ark | Craighead | 72401
P.O. Box No. or St. No. | City | State | County | Zip Code

Stone's Pharmacy | 315 E. Matthews-Jonesboro, AR 72401
Pay-to St. Add. & Name

Jonesboro | Ark. | 72401
City | State | Zip Code

AR 71-0404595 | AS 712-143-3
IRS Employer No. | DEA Number

291
Pharmacy Permit No.

*New Agreement received 1-9-79*
*St.*

# ARKANSAS SOCIAL SERVICES DIVISION
# MEDICAID PRESCRIPTION DRUG PROGRAM
# NOTIFICATION OF THIRD PARTY PARTICIPATION

Pharmacy Name Stone's Pharmacy Inc.

Arkansas Medicaid Provider Number C3-619

The above named pharmacy participates in the third party prescription programs listed below. Please itemize all third party participation with plan number when applicable. Include any state Medicaid programs you participate in with the exception of the Arkansas Medicaid Prescription Drug Program.

| Third Party Program | Dispensing Fee |
|---|---|
| | |
| | |
| | |
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Did participate in Plan A? program but terminated in June 1971.

S. Paul Brown R.Ph.

☒ This pharmacy does not participate in any third party programs other than the Arkansas Medicaid Prescription Drug Program.

*"This is to certify that the foregoing information is true, accurate, and complete. I understand that payment will be from Federal and State funds, and that any false claims, statements, or documents, or concealment of any material fact, may be prosecuted under applicable Federal and State law."*

I understand the provisions of payment specified under Arkansas Act 675 of 1979 and hereby acknowledge that Arkansas Social Services will be promptly notified of any revisions or additions in the third party participation status of this pharmacy.

/s/ Paul G. Brown
Provider's Signature

7-1-79
Date

SS-690 (5/79) July 03, 1979

I Paul G. Brown, authorize the following person(s) to sign claim forms for the Arkansas medicaid Prescription Drug Program from Stone's Pharmacy, Inc. :
(Name of Pharmacy)

/s/ Paul G. Brown

or

/s/ Sherry L. Stone

This document in no way releases me from having ultimate responsibility for the validity of all information submitted on each claim form from this pharmacy.

/s/ Paul G. Brown R.Ph.
(Provider's Signature)

1-8-79
(Date)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HON. GEORGE HOWARD, JUDGE

| | | |
|---|---|---|
| United States of America, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| VS. | ) | NO. LR-CR-84-4 |
| | ) | |
| Paul G. Brown and Stone's Pharmacy, Inc., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
MONDAY, MARCH 26, 1984
JONESBORO, ARKANSAS

Transcript Ordered by: Perroni & Rauls

Appearances:

For Plaintiff: George Proctor, United States Attorney and Sandra Cherry, Assistant United States Attorneys, U.S. Post Office & Courthouse, Little Rock, AR 72201

For Defendant Paul Brown:
Sam Perroni
Perroni & Rauls
Attorneys at Law
1523 S. Broadway
Little Rock, AR 72201

For Defendant Stone's:

Stan Rauls
Perroni & Rauls
Attorneys at Law
1523 S. Broadway
Little Rock, AR 72201

Volume 1
Pages 1 through 171 inclusive

MONDAY, MARCH 26, 1984

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(Proceedings in Chambers.)

THE COURT: All right. Let the record reflect that we are in Chambers in the presence of counsel for the government and counsel for the defendants as well as the Defendant Mr. Brown. The court has just received a copy of defendant's Motion in Limine and at this time we'll hear from Mr. Perroni.

MR. PERRONI: Thank you, Your Honor. If it please the court I'll go through these one at a time if you'd like, and I don't know if we'll have any disagreement on them or not. I'm sure we probably will on some of them. The first one I believe the court has had an opportunity to read it.

THE COURT: Yes.

MR. PERRONI: The first one deals with any reference by the prosecutors concerning the pecuniary interest of the taxpayers in this case, and as I've stated, that argument and those comments were made in the case of *United States v. Huckaby*, and although I didn't try that case and the defense attorney didn't object to it, it was done, and so I have asked that this be excluded in previous cases that I've had and the courts have done so. So that's why I'm doing it in this case. I don't know that they are planning on doing it.

THE COURT: Ms. Cherry?

MS. CHERRY: Well, Your Honor, we understand that the government's obligation to not appeal to the pecuniary interest of the juror, but we do want to make it perfectly clear what we do think is proper. We'll be talking about funds, Medicaid funds. We'll have witnesses explaining the Medicaid system. We will be talking about the depletion of funds. We'll be talking about wise use of the funds. We'll be talking about those things. We will not be talking about these are your funds, this is your money funding this system, that sort of thing, but we are entitled to put on a complete explanatory case from start to finish about the Medicaid system and how it works and we can't avoid the mention of Medicaid funds.

MR. PERRONI: May I comment to that? That's precisely what these cases deal with. That has absolutely no relevance in this lawsuit. The wise use of Medicaid funds. Where in the indictment does it say that Paul Brown had anything to do with the wise or imprudent use of Medicaid funds, and again this is exactly what the point I'm trying to make is, that that is an attempt to inflame the jury and appeal to them as taxpayers. "That may be my taxpayer money that's going out there" in an effort to try to convict Paul Brown based upon their passions rather than the evidence, and in what she's just said, that's exactly what she's going to do. She's going to try, "How is this money accumulated by Medicaid?" "Oh, it comes from the taxpayers," and "who is it paid out to?" "Well, it's paid out to the handicapped and the blind," so forth and so on and "How is it administered?" "Oh, my gosh, federal government does this and state government does that."

We're not saying that she should not be permitted to prove that there is an overall federal Medicaid statutory scheme and that the states are obligated or not obligated, they can if they want to, adopt a plan and that plan has to be approved by the federal government and then they ad-

minister the plan for the federal goverment and monies come in from the federal government, from the state government. That to me is part of her—part of the proof, and what she has alleged in the indictment, but this stuff about spending money wisely, that has nothing to do with this case.

THE COURT: Let me ask this question of Ms. Cherry. These observations will be made either/or during your opening statement as well as closing argument?

MS. CHERRY: More than likely, Your Honor, in closing after they become relevant to the case. An explanation of funds is probably sufficient.

THE COURT: All right, I'm ready to rule. Inasmuch as the court will instruct the jury that opening statements as well as closing arguments are not evidence but designed to assist the jury in understanding the evidence and applying the law, the court will deny this request. Moreover, in balancing the equities, that is to say, probative value vis-a-vis prejudicial effect, the court is not persuaded that the prejudicial effect is likely to outweigh the probative value, but the main and perhaps foremost reason that the court is denying the request is the fact that closing arguments and opening statements are not evidence and the jury will be so instructed.

All right, what's next?

MR. PERRONI: Number 2, I believe is self-explanatory. Based upon our interviews with this prospective government witness, she has made comments about an alleged drinking problem on the part of Paul Brown. I don't know if the government is going to intend to bring that out or not, but based upon my conversation with this lady, she may just go ahead and volunteer things like that herself, and I just think it would be prudent for, in order to avoid a potential mistrial situation, for the government to instruct

her not to be commenting on things like that which are irrelevant.

THE COURT: Ms. Cherry?

MS. CHERRY: Well, Your Honor, we would be sure and do that.

* * *

THE COURT: All right, Ms. Cherry, you may go to the jury with your closing argument.

MS. CHERRY: If it please the court, ladies and gentlemen of the jury. You've heard a great deal about the government's burden of proof and we do have the burden of proof in this case. We have to prove every count in the indictment beyond a reasonable doubt. I anticipate the court will instruct you on reasonable doubt. The court will tell you that reasonable doubt is not beyond an iota of a doubt or a shadow of a doubt, but it is beyond the kind of doubt that would make you hesitate to act in the most important of your affairs. But that is our burden and that is what we have carried through the trial.

I have come to think in trying cases that this is the time that the burden shifts to you, and you have to take what we have done and you have to sift through it and you have make a determination, and as in all cases, you are hearing two sides. You are hearing two versions, and it is your task to make the final determination.

What I am about to say to you ladies and gentlemen, is not evidence, and I do not think it is evidence. It is simply my recollection, the Government's recollection, of the facts. If I make a statement of fact and you don't agree with it, first of all know that that's not intentional on my part. We all are presenting as best we can what we recall. But also know that that's what the jury system is all about. That's

why there are twelve of you is so that you can sift through and make sure that twelve minds come up with the ultimate truth.

In our opening statement we outlined for you what we would do and what we would prove to you and I submit to you that we have kept our promise. We have proved to you exactly what we promised we would. I told you that it was a simple case and I'm sure there were times when you thought well she didn't know much about that. It was lengthy, it had lots of evidence in it, but it's still the same simple case that we talked about before. It is billing for a brand name drug and providing a cheaper one. That's all it's about. It's not whether the brand is better, it's not whether the brand is more helpful or harmful, it has nothing to do with any of that. It is whether or not a cheaper drug was provided and the Medicaid program was billed for a brand. There's nothing wrong with Theragran-M, there's nothing wrong with Geriplex, there's nothing wrong with generics.

Mary Alice Easterling from Blue Cross Blue Shield told you that Medicaid encourages generics and I asked her why and she said because it saves funds. But it doesn't save funds if you bill for something more expensive, and that's all this case is about, billing for something more expensive and doing it knowingly, doing it willfully, knowingly, and I submit that we've established that way beyond satisfaction.

Once this scheme was devised, we've charged that one was devised and you can see how it was devised, and once it was put into action it was simple and repetitious and carefully but easily executed.

I'd like, first of all, for us to look at the undercover buys. We have a chart on those and let's take a look at them. Now, if you will recall those government investigators, who were investigators from the attorney general's office came in and told you about each one of these purchases, and in every single instance the drugs that are listed there under

drug claimed were proven false. The pharmacist told you they were not the drugs that were in the bottle. The drugs clamied were not the drugs that were in the bottle, and each one of these investigators, Mr. Lucas who was Mr. Seagraves, Mr. Lowman who was Mr. Parker, all of those investigators told you that in each instance the man that filled those prescriptions was this man right there. They saw him fill the bottle. You can look at the bottle and his initials are on it. Paul Brown, owner of this establishment. He filled the bottle. He didn't fill it once and didn't fill it twice. He did this over and over again, and you will remember that the defense counsel said at the very beginning of this case, he gave you an example of the man that was in the grocery store and he had the toothpaste and he was carrying all this stuff and he stuck it in his pocket and he said that's what this case was about. Well, that's not what this case is about. No one is going to hold the man accountable that had to put toothpaste in his pocket one time to balance all his groceries, but on the 58th time, and that's what were dealing with, 58 times, that man put that same—did that same thing in the grocery store while shopping, that, ladies and gentlemen, would cause us to draw another conclusion and draw it with some confidence.

Now, on the Norma Morgan claims, the claims for Trinsicon when Geriplex was provided, the defense says that there would be substantial revelations, that I had told you what we were going to prove but there would be substantial revelations and wait and see. There was not any substantial revelations and it was laid out for you just as we said it would be.

Look at that. Over and over and over. All you had to do was just put dittos on our chart. Over and over and over. Now, on the Norma Morgan claims there are many different things that you can consider. We said that you'd have to look at Circumstantial evidence to look into the mind of Paul Brown and make fure he meant to do this knowingly, make sure this wasn't an accident, and aside from the repetitious

over and over and over again quality of what has occurred here, think about all of these things.

When you look at the Fox Meyer labels you'll find that his initials are again on the bottom. And don't let the defendants confuse you about the initials. When the investigators went in and when Paul Brown was filling the prescriptions the initials that went on the bottles were R.P.B. Those are Paul Brown's initials and we've seen him fill the prescriptions and they bear that initial. That's not a simple confusing, that's a simple matter. But you can look at these labels and you can make a determination that they are on there and you can think about J.P. Morgan's statement. He said that when they went into Stone's Pharmacy for the first time in 1981 this man Paul Stone, it doesn't matter what he called him, this man sitting here Paul Stone told him he'd have to change some numbers, something to that effect, so that Medicaid would pay for it.

The defendants questioned Mr. Morgan's memory, but I would like to point out to you that it is completely corroborated by the evidence. The claims started exactly when Mr. Morgan said that this event occurred and they ended just like the Morgans said they did, when they told them that Medicaid wouldn't pay for it anymore. Now, that was shortly before Dick Brazile from the F.B.I. went in there with a search warrant.

Dr. Verser had never prescribed anything to Ms. Morgan except Geriplex. He told you that, 1979. He said it was a liquid. But I want you to look at one other thing that we didn't quite explore. I want you to look at the Verser, alleged Verser prescriptions. You'll be able to see this a little bit better when you get the evidence back to the jury room and you can ask for all this evidence and please take it with you. It's so helpful. Right up here where it's circled and defendant told you in his opening statement that didn't mean that something would be in the bottle, I mean, he acknowledged it was a code of some kind. There's a circle

there and you'll notice it's clearer on the original prescription but it says over. When you turn it over it says, "Also prescription for Geriplex."

Ladies and gentlemen, the prescriptions were filled, and again I want to point out over and over and over. When you think about intent, think about that fact. Again and again.

Same with Roosevelt Coombs. You'll notice on the Roosevelt Coombs prescription it says, "not covered by Medicaid." Written in right here. "not covered by Medicaid." It's done with a red pen. It's the same red pen, apparently, that circled the R.X., that put the code on there and wrote the N.D.C. number on there.

Now, I want to talk a little bit about the Fox Meyer labeling. That is something that we submit is very significant and here again is something for you to examine. Mr. Brown and Stone's Pharmacy went on computer. If you'll recall they went on computer and went to Fox Meyer Laboratories and they're leasing equipment, aparently a terminal, which they type in at their end the information necessary for Fox Meyer to make out a claim and submit it for them to send into Medicaid. If you'll recall, and you'll have to look at this too, because you'll have to get it up close to really see it, but you remember there was three labels. But this first label, the one that's really important for our purposes, at the top there's a space for the druggist for Mr. Brown to type in instructions or directions to the patient. But this information down here is what is really important for billing purposes. It has to be on there. If that information—up here it doesn't make any difference but down here it's very important. It's got to be on there. Mr. Brown had to type that in. Brown and Stone's had to put that on the label.

Well, they couldn't give Mr. Lewis a jar that says Theragran-M at the top and Trinsicon at the bottom. So they just cut off the Trinsicon and you can look at it and see

and you can ask yourself if that's something that an innocent person would do or were they trying to do something specifically to disobey the law.

Now, another thing along the lines of the Fox Meyer labeling that I'd like to show you has to do with the clinics. Ladies and gentlemen, this entire case is a sample and the clinics were just one kind of sampling. If you'll recall the clinics occurred when the investigators wrote letters and said come in and bring your bottles and let us look at them and let us see what you've got in your bottles are what is on your label and Medicaid is being billed for, and the evidence of course showed that such was not the case with Rebecca Hudson and Phyllis Williams on two occasions and Mr. Hathcoat. But this is really a particularly unusual one. It's kind of interesting. This is for Phyllis Williams and it's prescription 8704 and there again it's got Trinsicon at the bottom, Trinsicon at the bottom of the label. They billed Medicaid for Trinsicon, but up here in the directions, and they've got the directions, and they've got the cheaper drug in the directions. Allbee. And you'll recall, and you can look at the chart, it's Allbee with C is the name of the drug. I guess that just helps them out a little bit.

And one final thing, ladies and gentlemen, on the evidence as we've presented it. This is the claim form and what we're alleging is false and what we established, we have proved substantially and without doubt is the drugs submitted. You will notice on the claim forms, the ones precomputer, don't have the name of the drug on it. That's what Ms. Easterling and I had to take such a long time to do was to go over all the claims and make sure that we had in the record what was actually—what N.D.C. number we're dealing with. But this is what's false, and that N.D.C. number plus a dispensing fee is all that we're concerned with. You're hearing all sorts of other terms about price, all sorts of other confusing things about what druggists pay but N.D.C. is the price in the master list like Ms. Easterling showed you, plus the dispensing fee. That's what the drug-

gist is paid. And if you plug in an N.D.C. number for a brand name you're going to get more money back than if you plug in an N.D.C number for a cheaper drug or if you have furnished a drug with no N.D.C. number at all.

Don't be confused by the mail argument. The court will instruct you thoroughly on the matter of mail fraud. Mail fraud simply comes about when you have devised a scheme to defraud, and as part of this on-going scheme you are either mailing or you're causing to be mailed like by the submission of a false claim, the court will instruct you on the law in this area, and these laws are devised to guard against the use of the United States mails for fraudulent schemes, and the court will tell you all about that. But I want, while we're at it, I want you to look at these checks.

Now, defendants are making quite a bit about the fact that in each of these checks there are only a few false claims that are listed on the remittance form that goes along with the claims, and I want you to look very closely at those remittance advice forms. They are with all the counts that go along with the mail fraud checks. In other words, the claims that have remittance advice forms attached are the ones which relate to the mail fraud counts.

Bear in mind this is a sampling. The defendant, if you will recall, told you that Medicaid, Medicaid, was a small portion of his business, but you can look at these checks and know that for these five alone, they are for a two month period, and they are almost $30,000. If Medicaid is a small portion of his business, it is still a substantial portion.

Now, ladies and gentlemen, consider all the witnesses, consider why they came here. Consider both our witnesses and their demeanor and what they said and the witnesses for the defendants. You should always do that in every case.

The government produced our undercover agents, the ladies and gentlemen from the attorney general's office.

They're young and polite and interested in what they are doing, and their job is to simply go in and investigate and report back to you.

We brought the recipients, and they are the people, you know, that the defendants say we're picking on. They are the people the defendants allege we're depriving of things, but they came in and they testified for us and the Morgans and Mr. Hathcoat, those people, they know that this is the wrong thing to do.

Mr. Brazile is an experienced F.B.I. agent and he came so that he could tell you about what he received in the warrant. Now, the defendants are trying to tell you that Mr. Brazile threatened them, but a threat implies that something is required of you, and if you will recall Mr. Brazile asked them no questions, but Mr. Brown said, "Is this serious?" and Mr. Brazile said, "Yes, indeed." and Mr. Brazile was absolutely right.

Don't be misled, however, by this conversation, because I anticipate the court will instruct you that punishment is the province of this man here, that this is not somehting with which a jury should be concerned, and I might add also, ladies and gentlemen, that from our common experience we know that no one can tell how much if any incarceration ever comes after a conviction.

Remember Maxine Jernigan, the nurse for Dr. Ferris came and said that Roosevelt Coombs had never been prescribed Trinsicon and finally Dr. Verser. Dr. Verser is the doctor's doctor. He told you that he'd been secretary-treasurer for many, many years of the State Licensing Board for physicians. That's the board that determines whether a doctor should have a license and keep a license, and he came with some irritation in his voice to explain that he had never prescribed Trinsicon for Ms. Morgan and told you why.

Then I wish you would go to the defense witnesses. The defense witnesses. The defendants produced Mr. West. Mr. West is a lobbyist. He is a lobbyist for the pharmacy association. His job is to persuade people on behalf of pharmacies. He is a salaried employee of an organization to which Mr. Brown belongs, and finally they recalled Ms. Morgan. They tried to make it look like Ms. Morgan—like Mr. Morgan didn't have a very good memory, but I think it finally resolved itself because Ms. Morgan said that she wasn't there when the conversation took place, she was looking at a magazine or something.

But there was one thing that they did not ask Ms. Morgan. They didn't ask Ms. Morgan about Mr. Brown's reputation for truthfulness and voracity, but they did ask Rebecca Hudson. You know, they promised you they would introduce testimony to that effect, and they did. They asked Rebecca Hudson and she said his reputation was good and she said it sitting there clutching her bottle with the false label on it.

The defendants said that we would not fulfill our promises but the defendants said and gave you many promises of its own. He promised you startling revelations which never came in regard to Norma Morgan. He promised you that he would establish that Mr. Brown did all this to help his loyal customers. Well, we've come to know now that Mr. Lowman, Mr. Seagraves, Ms. Holcomb, Ms. Raney, Mr. Battle, the investigators, were not old and dear customers and neither was Ms. Morgan. That was the first time they'd ever been to that store.

He also promised you that he would show you what a great guy Paul Brown was generally I believe is what was the promise. He would explain the codes, the circles and the X's and he stated again that the percentage of Mr. Brown's business in Medicaid was very small.

He also told you that he would establish that this was done for all his regular customers. Now, I'm not sure that

that would be of any help to us, because of course, we wouldn't know how those regular customers were billed. But that was not established.

Ladies and gentlemen, when you go back in the jury room take these claims with you. Remember that they are a just a sampling of Stone's Pharmacy. They are a sampling of how Paul Brown does his business. The defendants alleged initially in their opening argument that our investigation was incomplete and there is no question that it is. We can only tell you that these are the claims we have looked at and these are the claims that are false. They are absolutely false.

I anticipate that you'll have some reference to the fact that they don't add up to much money. Sort of like what is this all about? I mean, they are not very much money. Well, common sense tells us that you're not going to have much money on a claim listing individual prescriptions, but I anticipate that the court will instruct you that Congress thought that one claim was a crime.

When the Medicaid program was devised, Congress knew this money had to be protected. When you look at these claims, ladies and gentlemen, go over them very carefully and remember this, that we are dealing here with Petty Greed. Just what we said in the beginning. We are dealing here with petty greed, greed that comes up every time you submit a claim to get a few dollars more, but it is not a petty crime. This is public money. It's very important to us. It's protected only by those regulations about which the defendant so complains.

Mr. Brown doesn't like these regulations. I submit to you that they are the only thing, they are the only thing that stands between the public money, the money set aside for the truly needy and the greed of people like Paul Brown. Unfortunately, there are people in this country, and Mr. Brown is one of them, who thinks that public money, that

public money is to be schemed about and dipped into like a private kitty. Mr. Brown feels that this is the case here.

What we'd like for you to do, ladies and gentlemen, is go back and deliberate and take a long time if you wish. There's a lot of evidence to consider. There's a lot to think about, but when you come back, ladies and gentlemen, with your verdict, tell Paul Brown that that public money is money you want to be protected, that you don't want that public money to go to Paul Brown for his own private reasons. Tell him this conduct is over.

* * *

MR. PROCTOR: May it please the court, ladies and gentlemen of the jury, when I spoke to you initially I made a point that the United States is entitled to a fair trial. I think it bears repeating at this point of the trial. Oftentimes the fact is lost sight of that the United States is a party and has an interest and has rights, the victim of a crime has rights. The victim of this case is a program by which we administer and dispense medicine to those whom we hope need the medicine. So, we represent them. We represent the people of this nation on a crime that we think is very serious, and that's why we're here.

Quite frankly, I submit to you that the defense attorneys and the defendant have been overwhelmed by the evidence in this case. You've seen the evidence yourselves. I think I can show you without going back through the evidence as Ms. Cherry has, but it is simply overwhelming on the facts and the elements which we have to prove.

I agree with Mr. Perroni. Don't go into that jury room, don't decide this case without your common sense. You should always have your common sense. You're going to hear it in instructions. Common sense is very much a part of your duty as a juror, and you bring as much common sense maybe more than the rest of us into this courtroom. We want you to apply it to this case.

Just use your common sense. Think first about the opening statement by Mr. Perroni. Mr. Perroni, Mr. Rauls together are a formidable team, some of the best as a team, criminal defense lawyers you'll find in the state. Mr. Perroni knew the evidence, knew the evidence before he came in here. He knew it was overwhelming. But what did he do? He did what any lawyer does in opening statement. He sets out his game plan. His plan that he knows he needs to follow in order to get a vote of acquittal from you. What he did, like any good salesman and oftentimes this happens, even the best salesman, he overstated his case.

Let's look at it. Was he able to prove what he said he was going to prove? Paul Brown is a great guy. That's what he said. But who does he ask? He asks one witness about Paul Brown's credibility, his truthfulness. He asked the woman who is sitting there at the witness stand with a bottle of mislabeled drugs in her hand. Nobody else. No one else testified to character.

He promised substantial revelations. So what do we hear? Well, they seem to be that Ms. Morgan who was one of his witnesses, he called her back to the stand. Ms. Morgan thought that her husband's memory was not the best, that and his argument that they kept going back for refills every month.

The government hasn't proven who did the refills. I don't know whether you believe the testimony of J.P. Morgan. I don't know whether you felt like that he pulled those facts out of think air, but I submit to you that there is a ring of truth about what he said. He remembers when he went into that drug store what a pharmacist said. It was his first trip in there. He remembered him to be Paul Brown and he pointed him out and this stuff about calling him Paul Stone is ridiculous. He pointed him out in the courtroom. just like the agents did. They didn't know his name; they pointed him out. This is a man obviously without a lot of education. I don't know how smart he is, might have more

common sense than the rest of us, but he pointed him out. He was there with Norma Morgan while Norma Morgan was looking into something else. I have forgotten what she said but you will remember. He said I'll change the name or the numbers. Well, that's exactly what he did. That's what the proof shows. That's what the prescription shows. It shows that he put the number for another drug.

He started, according to the chart, February 12, 1981 continued refilling them and no, there's—I don't know that there's any proof that Paul Brown was actually there and performed the process of putting the pills in the bottle. All our proof so far has been that Paul Brown has been filling the others, but use your common sense. Paul Brown is the authorized Medicaid provider for that store. He signed for it. You've got an exhibit showing that. It's his stamp that goes on the claim. He's the president of the corporation. He set this in motion. Even if he didn't actually do it. This was done at his direction, and it was done for a year and a half, and it was done until May 7, 1983, which incidentally is, if you'll look at the evidence before you, is about the time of the investigation or at least the last one was before the last investigation. And what were the Morgans told when they walked back into the drug store, Stone's Pharmacy after the investigation? Medicaid doesn't cover that anymore.

We were going to get an explanation of the working of that store. The United States didn't know how that store worked. Someone knew how that store worked. Did we ever hear the evidence on how the store worked? None.

MR. PERRONI: Your Honor, may we approach the bench?

(SIDE BAR PROCEEDINGS.)

MR. PERRONI: Move for a mistrial on the grounds the prosecutor has made referernce indirectly to the defendant's failure to testify and take the stand in this case.

MR. PROCTOR: Your Honor, the defense's argument – there are other people in that store who could have done this work but he made a promise to the jury or statement to the jury at the start of the trial that they would show how the store worked. They haven't fulfilled that promise. They haven't put on proof as to the innerworkings of the store, so I think it behooves or is incumbent upon us to point out to the jury that that proof was not made.

MR. PERRONI: We don't have to prove anything. That's how this case has gotten twisted around. We don't have to prove one thing, and we start talking about proof, the innerworkings of the store, and he doesn't have to prove it and the prosecutor is commenting on the defendant's failure to take the stand.

THE COURT: All right, the motion is denied. Now, in the opening statement defense counsel did promise to establish certain matters. Moreover, the court has emphasized time and time again to the jury that the defendant is not required to take the stand nor is he required to offer any evidence. Also, the court will, when it gives its instructions, admonish the jury that the burden is always on the government to establish the defendant's guilt and that there is no duty on his part to establish his innocence. Okay.

(Proceedings in open court, jury present.)

MR. PROCTOR: Mr. Perroni and I have both talked to you about sympathy. Mr. Perroni stated in his statement that he wasn't going to try to invoke the sympathy of this jury and then he proceeded for about 30 or 40 minutes to talk. About half of what he said was directed at sympathy. He was trying to invoke sympathy. You will be instructed that you are not to have sympathy for the defendant, that you are to make your decision based on the evidence. The facts in the case, if he's guilty, return a verdict of guilty.

There was no reason for Mr. Perroni to cross examine the F.B.I. agent about his statement to the defendant about the seriousness of the offense except to try to make you, the jury, think that he was going to get a prison sentence. There was no reason for him to make the statement that this man wouldn't risk all this because he would lose his license except to tell you, or try to tell you, that if he's convicted he would lose his license. Why do you think, and use your common sense, and I don't think I even have to tell this to you, but I just want to say it because it bothers me not saying it. Why would he stand behind his clients during opening statements with his hands on his shoulders and proceed to tell you the story of a man's life? What does that really have to do with whether or not he's sending false claims except to invoke sympathy.

Why would he try to tell you that Coombs and Morgan were treated unfairly by the government, that they didn't get their benefits except to invoke sympathy? Neither of which is true.

Mr. Perroni tells you that this is a case that you can't understand. If you can't understand it you can't convict. What you might if you can't understand something, you might not understand the issues he's put in, like generics, average price, goes on and on. Non-issues. I don't even want to say anything about generics because everytime we cross this hurdle we say it has nothing to do with the case, but there have been a couple misstatements, and I don't think they were intentional, but they were wrong.

One misstatement was that if setting up these undercover buys if the government really wanted to notify or to stop the defendant from putting generics on there or for billing for brand names and not substituting generics just put that on the prescription. The law calls for it. I'm not sure where their law is now but if you'll look at the law when you go back there, there is exceptions. A doctor can or rather the pharmacist does have the right to substitute for

a generic provided the doctor hasn't told him he doesn't want him to substitute or if he tells the patient and do you remember any testimony about the patient being told?

Anyway, when you go back there, look at that law and also look at the William Lewis, Elsie Scruggs and the Dr. Kemp prescription. You'll see that certainly with the Lewis Scruggs, four different prescriptions that the doctor did sign on there over the line which says dispense as written. He signed his name there as opposed to the other side which says substitution allowed. It's not important except it's wrong, and there are other things wrong, but I'm not going to rebut everything. I'm not going to get you into this quagmire of areas that really don't have anything to do with this case, because you need to keep your focus on the case.

You're going to hear the instructions. You're not going to hear instructions about all this other stuff that you're hearing. You're going to hear about what we talked about. You're going to hear about what our witness said. You didn't see us jumping up and cross examining or redirecting or talking to our witnesses again about this matter of generics and average price wholesale and Mac lists MAC lists and all of that because they are not issues. The issues in this case are whether or not there were substitutions made and other medications billed to the Medicaid program. That's what it's about. That issue and of course the issue of giving a person one drug and billing the Medicaid program for another. Didn't hear much about that.

I'll tell you why you didn't because it's the worse thing about the case. It's all of the Normal Morgan counts. Everytime you see Trinsicon you know, everytime you see Trinsicon on one of our charts you know that what they've done is they've billed Medicaid for this expensive complex vitamin and they actually dispensed a less expensive across-the-counter vitamin that doesn't even require a prescription.

Remember Charles West? He was the executive secretary for the pharmacy association, a lobbyist who said part of his duties were to come into court or not into court, to go before any forum, speak on behalf of pharmacists. Yeah, he came here and he spoke for the defendant. The defendant, who along with other pharmacists, pays the man's salary with their dues.

Like many of you I have a lot of respect for the pharmacists of this state. It doesn't surprise me that they are not taught retailing in college. They are taught ethics and taught how to dispense pharmaceutical goods. They are not taught retailing. They are not taught how to make a profit. Pharmacists in many areas the testimony has been are very important, very important to the health care system. That probably was why Dr. Verser was offended and indignant about the fact that this defendant would put Trinsicon on his label, take Dr. Verser's client patient, give her the Geriplex and bill Medicaid for Trinsicon. Trinsicon, which as he said, masks the symptoms of many diseases. Certainly Ms. Morgan didn't get Trinsicon. What she got was a bottle that had Trinsicon on it. Ms. Morgan doesn't know what her drug is. She doesn't know what she's taking. She knows it wasn't Trinsicon. She looks at the label. She doesn't know the name. She goes to the doctor's office, has a bottle of Trinsicon. The doctor looks at it and says what are you taking. Trinsicon. He treats her according to her symptoms, right? He doesn't expect any symptoms because she's taking Trinsicon which he says masks symptoms. It hides symptoms. We're talking about a very, risky, dangerous important area when we're talking about medication.

What we're getting here, these arguments about taking care of these poor people, a Robinhood argument, you hear it all the time, rob from the rich, give to the poor. He's already called the United States wealthy, unlimited resources, look at the case we put on, look at all the money we spent. Well, I submit to you the United States is not rich, the funds are not unlimited for payment of this medication

and I submit to you further that not only is he not robbing from the rich and giving to the poor, he is lining his own pockets. He's giving to the poor but he's taking his part, and what he's doing is he's saying I'll decide who gets it. We won't follow these guidelines. I'll give them high priced vitamins, bill Medicaid for the brand name.

They say big deal. You have proven $650. That's all. We have never added it up. I don't know what we've proven because that's not the point. But it just occurred to me that if there is $650, who are we talking about? How many patients are we talking about? Well, add them up. We're talking about six are undercover agents who sent in for a very few buys, probably fewer than normal patients would. A patient after all under Medicaid has a right to go in four times every month, three or four times, I've forgotten. They did this over five months. Then there was Norma Morgan over a year and a half and I guess she'd have gone on indefinitely getting this expensive Trinsicon had the investigation not started. So, okay, you're talking about $650. You're talking about ten patients for five months and then one patient for a year and a half. That's a lot of money when you think about those patients, no more patients than that.

Testimony was that or not testimony but opening statement, there I go. Remember none of the opening statement is evidence. You heard a lot of talk but no evidence but according to the opening statements he'd done 5,000 scrips a year for Medicaid.

There isn't one standard of proof for professionals and another for other people. Larceny is larceny. The fund he's taken from isn't inviolet. The law wouldn't allow it.

I really think that we're going to get a fair trial from this jury. I'm perfectly satisfied it's an impartial jury. When we talked not a one of you told me that you would try to try the Medicaid program and you said if you felt the Medicaid program was unfair and I don't think you do, but even if you

did you wouldn't allow this to affect your judgment but most important each of you felt that if we proved all the facts of the case you'd consider only the law and consider the facts and apply the law not apply your own opinion of the law and not get off on these side issues. That's all we've asked you to do and I think that's what you'll do. So with that I want to thank you and ask for your vote for a conviction. Thank you.

* * *

APPENDIX F

* * *

MR. PERRONI: Your Honor, we are prepared to begin our defense. However, we really need to take something up with the court in chambers concerning some of the witnesses, an item that needs to be considered by the court before we start presenting the witnesses. I hate to take up more of the court's time with this.

THE COURT: How much time do you need?

MR. PERRONI: It won't take me very long to state it. It just depends on what the government's response is to it.

THE COURT: Can we do it here at the bench? Will that suffice?

MR. PERRONI: I suppose it could, depending upon what the government says.

(Side bar proceedings.)

MR. PERRONI: I think the best way to start this out it relates to the anticipated testimony of Dr. Taylor we talked about this morning. After we had a discussion we visited with Dr. Taylor about his testimony and have determined that the only thing we know of that Dr. Taylor could testify to would be concerning an incident or disagreement, however you'd like to put it, with the defendant Paul Brown over a prescription that Dr. Taylor cannot remember the name of the patient on and the date or this and that over a prescription where Dr. Taylor contends take Paul Brown dispensed some medication without the doctor's authority. Now, we intend, of course to call—the point is well taken it was a non-Medicaid patient—without the doctor's authority. Now again our information is that Dr. Taylor can't

remember the name of the patient or when it was done, just that it was done. Number one, we intend to call some character witnesses in this case. I'd like to know whether or not the government intends to try to go into that incident with the character witnesses in an attempt to cross examine them pursuant to Rule 405-B of the Federal Rules Evidence.

THE COURT: What says the government?

MR. PROCTOR: We haven't reached that decision Your Honor. We are considering cross examination of character witnesses as to this incident and other incidents.

MR. PERRONI: What I'd like to do is this. I have a list. I had my law clerk look up some law for us and, of course, the rule we're talking about is Rule 405. It basically codified the rule in *Mickelson v. United States* which is 435 U.S. 469. Now, it deals with cross examination of character witnesses. But basically in interpreting the rule my law clerk, in researching through Weinsteins at Section 405-02 pages 5 through 22. 403-22 is the page and also she found a case of *Mullins v. United States*, 487 Fed. 2d 58 Eighth Circuit case that it may be that the prosecution can ask the witnesses questions, but in order for the prosecution to be able to ask this, number one, they have to have a good faith basis for asking them and I'm not suggesting that they don't because Dr. Taylor has made comment. In this regard there would be a good faith basis for asking. Number two, it has to be not remote in time and number three the court needs to make a determination as to whether the unfair prejudices that would flow from questioning a witness about an item, that's going to cause the defense to go off on a long involved confused tangent to show that he disputes not disputes. The incident between Dr. Taylor and Paul Brown was really a misunderstanding more than it was anything that would bear upon Paul Brown's truthfulness and honesty which outweighs the admissibility of it. These two citations that I gave you seem to indicate that what the court should do in this instance is to hear the testimony relating to this

particular incident and determine what it is the government is going to ask the character witness then make a ruling on it before the defense calls the witnesses. Because if we call the witnesses and they ask a question have you heard this or have you heard that Paul Brown falsified a prescription of Dr. Taylor's on an unspecified date and the witness says no and she asks nine or ten, the skunk is in the jury box. We can't get it back out without going through a long detailed exploration.

THE COURT: Let's see if they plan to do that. They may not. What's your reply, Mr. Proctor?

MR. PROCTOR: All I can say is we're undecided. We feel like all we have to do is show a good faith basis in order to ask these questions. We don't want to be put in the spot of having to declare at this point what questions we're going to ask.

THE COURT: It may be it's premature.

MR. PERRONI: The problem is this. Everyone of these character witnesses, and I am stating for the record right now, that if the prosecution is going to be permitted to ask these character witnesses about this alleged incident which I think will prejudice my client to such an extent that he won't be able to get a fair trial, then I'm not going to call the character witnesses. That's how important it is. So I have nine substantial people in this community who are going to testify to Paul Brown's reputation for truthfulness and honesty and so consequently I'm not going to be calling those witnesses and I'm stating that for the record to show that mere potential for asking that kind of question, which I believe would be unfair and highly prejudicial and not probative, I think. If it was explored by the court the court would see that it's not probative because it's too confusing and it would involve a long explanation by the defendant. If I chose to put character witnesses on it would consume a lot of time and take us off on a tangent about whether or not

Paul Brown at one time filled a prescription for somebody without authority.

THE COURT: Well, the government says right now they don't know whether they are going to use this. I suppose other instances or some specific instance, is that right?

MR. PROCTOR: That's right, Your Honor, we're looking at other instances too, all false labeling which go to honesty which is what is being put into issue here.

MR. PERRONI: I think the law is that I'm entitled to have it presented to the court and that the prosecutor is obligated. They have got to know—

THE COURT: Step into the library and get that case.

MR. PERRONI: The point is, before I get the case, what if I put the witness on the stand right now? Our first witness was a character witness. Now the prosecutor ought to know within the next minute or two whether or not they intend to cross examine the character witness about that. And if they do I'm stating for the record that I do not intend to put on any of the character witnesses, because one question of one character witness is all that it's going to take and I don't think that the questioning is probative and I think it would be unfair and highly prejudicial, and so what I'm saying is I think the law is we need to be able to know which way to go

THE COURT: What you're saying is you think you're entitled to a *Jackson v. Denno* type hearing.

MR. PERRONI: Yes, for the court to determine:

THE COURT: Is that what that case says?

MR. PERRONI: That and Weinstein's.

THE COURT: Let's look at this case.

MR. PROCTOR: I'd like to look at something too.

THE COURT: Has the government changed its position at all?

MR. PROCTOR: No, Your Honor, at such time we have cross examination of his previous act of mislabeling and other matters we will present to the court a copy of a statement obtained from witnesses to indicate to the court that we have a good faith basis for asking these questions.

THE COURT: Do you propose to submit a copy to defense counsel?

MR. PROCTOR: We wish to show to the court that we have a good faith basis.

MS. CHERRY: Your Honor, the problem to me with this is that what happens in instances like this is what defendants are saying is that we're going to gear our case to what your rebuttal witnesses are. In other words, Dr. Taylor, for instance, is someone who could be called in rebuttal and—

MR. PERRONI: Can't—

MS. CHERRY: Please let me finish. Consequently, we don't mind making a good faith objection to the court but we object to having to disclose all these statements to the defendant now.

MR. PROCTOR: My proposal would be that after the witness has testified we make an exhibit of the statement for appellate purposes here, not for the jury, an exhibit for the record, indicating we have a good faith basis.

THE COURT: Well, I think what Mr. Perroni is saying he would then be placed on the horns of dilemma. The

witness, he has offered testimony of good character, and he can't withdraw that but if he's forewarned may not even call any character witnesses. Of course, realizing that Mr. Proctor and Ms. Cherry are certainly aware of the law, I hardly think that they would probably be asking questions about specific instances of bad acts and misconduct or what ever. That might get them into trouble. I can't perceive that, but they might.

MS. CHERRY: It's happened.

THE COURT: That's a risk that they should run or you should assume. The court, while the court didn't say this specifically, it indicated it might be a good policy for the court to retire to chambers and conduct an in camera hearing.

MR. PERRONI: I really and genuinely believe this. I think the sole purpose of my inquiry of you to do this would be that in the interest of justice that the court ought to consider this before the prosecution starts asking questions about things which, for instance, may end up not even being true. Let's say that they ask a witness have you ever heard that Paul Brown falsified a prescription for a patient for Dr. Taylor. It could turn out that that's not even true, but once they ask the witness that, the skunk's in the jury box. The burden moves to the defendant to prove it wasn't true. If they ask about one, then that's one. If they ask about ten we've gotten side areas that we are venturing off into.

THE COURT: Would you be satisfied if they made a disclosure in writing a summary of what they propose to elicit or to inquire?

MR. PERRONI: I would be satisfied, Judge, with this and I don't mean to be difficult. I would be satisfied with, number one, a statement from them they are indeed going to ask the character witnesses certain questions and for

them to state which questions they are going to ask the character witnesses relating to which specific instances. I think I'm entitled to know that and if they are going to ask about Dr. Taylor or Dr. Jones or Dr. Smith or he mentioned something about misbranding labels. They surely know what they are talking about. Now to get up there and ask a witness have you ever heard of Paul Brown misbranding labels on medication, that's so vague and ambiguous, that is, there's no way for the defendant to prove that he never did something in his entire lve.

THE COURT: Disregarding the vagueness would it be relevant?

MR. PERRONI: It wouldn't be relevant but by the time they ask the witness then it's all over for me.

THE COURT: Would it be relevant in connection with these charges?

MR. PERRONI: I wouldn't think so. It depends on whether or not it relates to Medicaid recipients.

THE COURT: What's your reply?

MR. PROCTOR: Your Honor, it would be relevant because what Mr. Perroni would be doing would be putting the issue in this case and we would not ask a question such as he proposed. I would ask whether a witness had heard a particular person make a statement, and I would ask whether he had heard the statement, and to show our good faith basis, Your Honor, it's not necessary to put on our witness and have an adversary proceeding in camera. There's plenty of law to the effect that hearsay is sufficient to establish a good faith basis and what we propose to do, which is more than we normally do, is give the court a copy of the statement of the individual.

THE COURT: Then you're going to give him a copy, too.

MR. PROCTOR: No.

THE COURT: You're going to limit this to the court to establish good faith. Is that the size of it?

MR. PROCTOR: Your Honor, at the time we are prepared to ask the questions I wouldn't mind defendant seeing it.

THE COURT: But it's too late for you then to make a decision whether or not to call the witness.

MR. PROCTOR: I'll give it to him now.

MR. PERRONI: Let me state something else.

THE COURT: He's going to give it to you now.

MR. PERRONI: I know and this is the point I'm going to make about it. We talked to Dr. Taylor. Dr. Taylor told us he could not remember the name of the person nor the date. Now I don't know what he said in this statement, but it doesn't make any difference because Rule 608 says that they cannot introduce evidence, extrinsic evidence, which means this. They can't come back on rebuttal and put Dr. Taylor on. They are trying to show this because they are trying to say listen, we've got a good faith basis for asking. I'm saying the prejudice would so outweigh the probative value that they shouldn't be even permitted to ask the questions of the character witnesses. If this stuff related to the charges, why didn't they introduce it in their case in chief?

THE COURT: Well, I'm looking at the plain meaning of 405. Specific instances of conduct in which character or trait of character of the person is an essential element o

charge claim defense. Proof may also be made of specific instances. So he has the right to do it.

MR. PERRONI: If it's not Medicaid and it doesn't relate to false claims to Blue Cross and Blue Shield?

THE COURT: But if it relates to honesty and integrity, I think that's the thrust.

MR. PERRONI: I'm merely asking the court for an opportunity to have the prosecutor state yes I'm going to do this.

THE COURT: He's ready to give you copies of what the witnesses—

MR. PERRONI: Will be asked.

THE COURT: —will be asked.

MR. PERRONI: Secondly, I'm asking the court to review what it is to see if the court feels prejudice would outweigh the probative value.

THE COURT: Do you have any objections to that?

MR. PROCTOR: No objection, Your Honor.

MR. PERRONI: Since he won't let me look at it.

THE COURT: He's going to give you a copy.

MR. PROCTOR: Your Honor, I hand the court government's Exhibit 83 a good faith basis for asking any character witness regarding mislabeling reported by Bill Cox consultant pharmacist for Rose Care Center of Jonesboro, Arkansas Department of Health, Little Rock a letter dated March 20, 1984. I only have one copy of that.

THE COURT: Mr. Perroni?

MR. PERRONI: Your Honor, I haven't read that letter. I would like to have it made part of the record. Number one, if I understand it correctly is that a letter written about a bottle found from Stone's Pharmacy? Read the letter to me.

THE COURT: Do you have any objections?

MR. PROCTOR: No, sir.

THE COURT: "On March 12, 1984 Bill Cox consultant pharmacist for Rose Care Center of Jonesboro discovered a bottle of Decadron that has been improperly labeled as Dexedrine. The prescription had been filled by Stone's Pharmacy of Jonesboro January 7, '83. It was to replace a bottle of Dexadrine used out of the emergency cart by Crixoria (phonetic) Goodman, a nursing home resident. It was not discovered earlier because the new bottle of medicine was placed in the old Dexadrine box which was marked to expire April of 1984. Due to the present investigation concerning the above drugstore and its manner of handling generic drugs, the consultant pharmacist and myself felt you should be made aware of this incident. Sincerely, Janet A. Waldon, Administrator."

MR. RAULS: If I may, number one, that letter was received by Stone's Pharmacy I believe last week, a week before the trial. We have a concern of anyone who stated sending that letter. Number two, whether a drug bottle is properly labeled is a source of confusion that has been battled back and forth between the state pharmacist and doctors for the last three or four years at least since the Generic Substitution Act was passed in 1975. Doctors don't like generic substitutions. Even within the association they couldn't agree as to what is proper labeling in regard to a generic substitution. Now if we have to explain that to a jury, anything they will hear is false labeling and this is not a false labeling case, Judge.

MR. PERRONI: Does it relate to Paul Brown?

THE COURT: Stone's Pharmacy.

MR. PERRONI: I'm not going to be asking character witnesses about Stone's Pharmacy's reputation.

THE COURT: But you've got the president and major stockholder. He's the owner.

MR. PERRONI: If an employee of his filled the bottle and for whatever reason mislabeled it and Paul Brown had no knowledge of it how can that relate to his reputation and for truthfulness and honesty?

THE COURT: What's your reply?

MR. PROCTOR: I'm sorry, Your Honor, I was looking at that letter. We're dealing here with Paul Brown's reputation for honesty, not what actually happened but his reputation. We are asking questions of character witnesses to determine their ability to tell this jury what its reputation is. We have put forth evidence before the jury virtually in—certainly everyone of our claims was processed by the Defendant Paul Brown, and I think that the jury could get an inference as far as reputation of this defendant, that these witnesses actually don't know his reputation if they are not aware of the fact that he's been reported to the Department of Health or his family has for mislabeling of drugs.

THE COURT: Yes. Reputation is what the people say about him in the community and this is what somebody in the community is saying and the question, in order to defend their credibility of a witness, a character witness, if he's knowledgeable of this incident.

MR. PROCTOR: We're not trying to show—we don't have to show that he mislabeled. All we have to show is this

is his reputation and we have a good faith basis. We have a legal opinion to show that we're not asking the questions without a good faith basis and that's all we're trying to show the court.

THE COURT: All right. The court finds that there is a good faith basis, that it is not remote in time, and that it is relevant. We are talking about the defendants' voracity, integrity, and honesty and this would appear to be quite relevant.

MR. RAULS: May the record reflect that that letter was written by a witness after that witness was subpoenaed by the prosecution? He is a witness in this particular case.

MS. CHERRY: I don't know that that letter is subpoenaed by us at all.

THE COURT: All right. Well, the court is going to permit him to make inquiry of those character witnesses about this incident.

MR. PERRONI: That's the one on the labeling. What about the one on Dr. Taylor here?

MR. PROCTOR: Now I'd like to make an exhibit government's Exhibit Number 84 for this purpose and the court has a copy.

THE COURT: Oh, this is the same one here?

MR. PROCTOR: Yes.

THE COURT: Have you seen the Taylor statement?

MR. PERRONI: Yes, Your Honor. The summary does not—is not consistent of what Dr. Taylor told us personally.

MR. PROCTOR: Okay.

THE COURT: Well, the only thing I'm dealing with this is something the government has submitted to show whether they are pursuing this in good faith and I'm persuaded that there's a good faith basis. It's not remote. As a matter of fact the incident occurred March 4, 1983. I think it's quite relevant to test the credibility off the character witness or witnesses whether they are knowledgeable of this specific incident.

MR. PERRONI: I'd like to request the court hear Dr. Taylor in camera before they are permitted to ask these questions.

THE COURT: All right, what's the government's position on that?

MR. PROCTOR: Your Honor, just because Dr. Taylor did not tell Mr. Perroni everything that is contained in this letter does not mean Dr. Taylor is going to testify differently from this letter if we use him for rebuttal. It's absurd to say that the witnesses have to talk to someone and have to tell them everything.

MR. RAULS: Your Honor, may I make an observation? We're presenting to the court that facts that were directly presented to us. The prosecutor presented to the court facts that were presented to him by an investigator who allegedly took facts from Dr. Taylor. Now the prosecutor, if he wants to tell the court what Dr. Taylor has told him and he wants to state that it's consistent—

THE COURT: Is he out there now?

MS. CHERRY: I don't think Dr. Taylor told me that yesterday.

MR. PERRONI: This is the thing. Let's just say that if they were going to ask the character witness—my understanding of the law is that if the character witnesses

did not know about it that they couldn't put extrinsic evidence on the stand to show that Dr. Taylor did or did not have a prescription or they couldn't do it. The sole purpose is to ask the witness if he's heard it or not heard it. If they want to put a witness on the stand who could testify that the witness was specifically told about this incident, then maybe they could, but to put Dr. Taylor on the stand in rebuttal, if all the witnesses said no I've never heard anything like that, to ask a rebuttal witness is improper, number one. Number two, if Dr. Taylor is not, if he's not consistent with what Dr. Taylor is now stating then the probative value is even reduced even farther. That's the point I'm trying to make.

MS. CHERRY: Your Honor, we were debating whether to continue with all this. We're also supplying more facts but if the defendants are saying they talked to Dr. Taylor and Dr. Taylor disavows his memorandum. Dr. Taylor yesterday morning to me showed me the bottle that he's talking about and—

THE COURT: He confirmed this statement.

MS. CHERRY: Yes, somewhere along the line. So that's our good faith reliance.

THE COURT: I think they've met good faith.

MR. PERRONI: I think more than good faith is required.

THE COURT: What he's saying is Dr. Taylor hasn't made this statement in effect. His version is dramatically different from yours, diametrically opposed.

MR. PERRONI: I'm saying Dr. Taylor told Stan and Stan told me this but told Stan that he could not remember the name of the person or the date. All right. That's what I'm telling the court.

THE COURT: You're shielded by Mr. Rauls.

MR. PERRONI: That's exactly right.

MR. PROCTOR: Should we object on the basis of hearsay?

(Laughter.)

THE COURT: Where is the doctor?

MR. PERRONI: They sent him back to the clinic.

MR. PROCTOR: We have, as defense counsel knows, a very unhappy doctor because he has been here and waited and that was our fault. We didn't realize he was out there and should have gotten rid of him to go back to his practice. He's been very unhappy. We honestly and sincerely don't see the reason for it but suggest to the court the defense counsel would have a full blown hearing which is on questions of fact which are better presented to the jury.

THE COURT: I've got a summary here and I'm persuaded that there's a good faith basis and I will permit them to ask these witnesses. I'm going to deny your request for an in camera hearing in light of the fact the government is making this an exhibit for the record. Is that correct?

MR. PROCTOR: We are, Your Honor, both exhibits.

MR. PERRONI: I'm stating for the record, Judge, that I'm not going to call the character witnesses that I have and I'd like to reserve the opportunity at another time to proffer the tesitmony, a summary of the testimony, not all the witnesses, of course, but a summary of the testimony the name of the witnesses that I intended to call as character witnesses that I'm not going to call now in view of the government's statement that they are going to ask them questions about this stuff.

THE COURT: So, there won't be any character witnesses.

MR. PERRONI: Not based upon their representation that they are going to ask the character witnesses about those.

* * *